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NORTH CAROLINA REPORTS
VOL. 231

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1949

SPRING TERM, 1950

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1950

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

Inasmuch as all the Reports prior to the 63rd have been reprinted by the State, with the number of the Volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C.
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"	12 " "	"	34	"
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1 Hawks	"	8	"	4 " "	"	39	"
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4 " "	"	15	"	1 Jones Law	"	46	"
1 " Eq.	"	16	"	2 " "	"	47	"
2 " "	"	17	"	3 " "	"	48	"
1 Dev. & Bat. Law	"	18	"	4 " "	"	49	"
2 " "	"	19	"	5 " "	"	50	"
3 & 4 " "	"	20	"	6 " "	"	51	"
1 Dev. & Bat. Eq	"	21	"	7 " "	"	52	"
2 " "	"	22	"	8 " "	"	53	"
1 Iredell Law	"	23	"	1 " Eq.	"	54	"
2 " "	"	24	"	2 " "	"	55	"
3 " "	"	25	"	3 " "	"	56	"
4 " "	"	26	"	4 " "	"	57	"
5 " "	"	27	"	5 " "	"	58	"
6 " "	"	28	"	6 " "	"	59	"
7 " "	"	29	"	1 and 2 Winston	"	60	"
8 " "	"	30	"	Phillips Law	"	61	"
				" Eq.	"	62	"

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i.e.*, the original) paging.

The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

From the 7th to the 62d volumes, both inclusive, will be found the opinions of the Supreme Court, consisting of three members, for the first fifty years of its existence, or from 1818 to 1868. The opinions of the Court, consisting of five members, immediately following the Civil War, are published in the volumes from the 63d to the 79th, both inclusive. From the 80th to the 101st volumes, both inclusive, will be found the opinion of the Court, consisting of three members, from 1879 to 1889. The opinions of the Court, consisting of five members, from 1889 to 1 July, 1937, are published in volumes 102 to 211, both inclusive. Since 1 July, 1937, and beginning with volume 212, the Court has consisted of seven members.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1949—SPRING TERM, 1950.

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

WILLIAM A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
A. A. F. SEAWELL,
EMERY B. DENNY,
S. J. ERVIN, JR.

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
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RALPH MOODY,
JAMES E. TUCKER,
PEYTON B. ABBOTT,
JOHN HILL PAYLOR.

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
CHESTER MORRIS	First	Currituck.
WALTER J. BONE	Second	Nashville.
R. HUNT PARKER	Third	Roanoke Rapids.
CLAWSON L. WILLIAMS	Fourth	Sanford.
J. PAUL FRIZZELLE	Fifth	Snow Hill.
HENRY L. STEVENS, JR.	Sixth	Warsaw.
W. C. HARRIS	Seventh	Raleigh.
JOHN J. BURNEY	Eighth	Wilmington.
Q. K. NIMOCKS, JR.	Ninth	Fayetteville.
LEO CARR	Tenth	Burlington.

SPECIAL JUDGES

W. H. S. BURGWYN	Woodland.
WILLIAM I. HALSTEAD	South Mills.
WILLIAM T. HATCH	Raleigh.
WILKINS P. HORTON[1]	Pittsboro.

WESTERN DIVISION

JOHN H. CLEMENT	Eleventh	Winston-Salem.
H. HOYLE SINK	Twelfth	Greensboro.
F. DONALD PHILLIPS	Thirteenth	Rockingham.
WILLIAM H. BOBBITT	Fourteenth	Charlotte.
FRANK M. ARMSTRONG	Fifteenth	Troy.
J. C. RUDISILL	Sixteenth	Newton.
J. A. ROUSSEAU	Seventeenth	North Wilkesboro.
J. WILL PLESS, JR.	Eighteenth	Marion.
ZEB V. NETTLES	Nineteenth	Asheville.
DAN K. MOORE	Twentieth	Sylva.
ALLEN H. GWYN	Twenty-first	Reidsville.

SPECIAL JUDGES

GEORGE B. PATTON	Franklin
A. R. CRISP	Lenoir.
HAROLD K. BENNETT	Asheville.
SUSIE SHARP	Reidsville.

EMERGENCY JUDGES

HENRY A. GRADY	New Bern.
FELIX E. ALLEY, SR.	Waynesville.
LUTHER HAMILTON	Morehead City.

[1]Deceased. Succeeded by Howard G. Godwin, Dunn, appointed 8 February, 1950.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
GEORGE M. FOUNTAIN	Second	Tarboro.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Kenly.
W. J. BUNDY	Fifth	Greenville.
J. ABNER BARKER[1]	Sixth	Roseboro.
WILLIAM Y. BICKETT	Seventh	Raleigh.
CLIFTON L. MOORE	Eighth	Burgaw.
MALCOLM B. SEAWELL	Ninth	Lumberton.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

WALTER E. JOHNSTON, JR.	Eleventh	Winston-Salem.
CHARLES T. HAGAN, JR.	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
BASIL L. WHITENER	Fourteenth	Gastonia.
JOHN R. MCLAUGHLIN	Fifteenth	Statesville.
JAMES C. FARTHING	Sixteenth	Lenoir.
AVALON E. HALL	Seventeenth	Yadkinville.
C. O. RIDINGS	Eighteenth	Forest City.
W. K. MCLEAN	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
R. J. SCOTT	Twenty-first	Danbury.

[1]Deceased. Succeeded by Walter T. Britt, Clinton, appointed 20 December, 1949.

SUPERIOR COURTS, SPRING TERM, 1950

The numbers in parentheses following the date of a term indicate the number of weeks during which the term may be held.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT
Judge Burney

Beaufort—Jan. 16* (2); Feb. 20† (2); March 20* (A); Apr. 10†; May 8† (2); June 26.
Camden—Mar. 13.
Chowan—Apr. 3; May 1†.
Currituck—Mar. 6.
Dare—May 29.
Gates—Mar. 27.
Hyde—May 22.
Pasquotank—Jan. 9†; Feb. 13†; Feb. 20* (A) (2); Mar. 20†; May 8† (A) (2); June 5*; June 12† (2).
Perquimans—Apr. 17.
Tyrrell—Feb. 6†; Apr. 24.

SECOND JUDICIAL DISTRICT
Judge Nimocks

Edgecombe—Jan. 23; Mar. 6; Apr. 3† (2); June 5 (2).
Martin—Mar. 20 (2); Apr. 17† (A) (2); June 19.
Nash—Jan. 30; Feb. 20† (2); Mar. 13; Apr. 24† (2); May 29.
Washington—Jan. 9 (2); Apr. 17†.
Wilson—Feb. 6†; Feb. 13*; May 15*; May 22†; June 26†.

THIRD JUDICIAL DISTRICT
Judge Carr

Bertie—Feb. 13 (2); May 8 (2).
Halifax—Jan. 30 (2); Mar. 20† (2); May 1; June 5† (2).
Hertford—Feb. 27; Apr. 17 (2).
Northampton—Apr. 3 (2).
Vance—Jan. 9*; Mar. 6*; Mar. 13†; June 19*; June 26†.
Warren—Jan. 16*; Jan. 23†; May 22*; May 29†.

FOURTH JUDICIAL DISTRICT
Judge Morris

Chatham—Jan. 16; Mar. 6†; Mar. 20†; May 15.
Harnett—Jan. 9*; Feb. 6† (2); Mar. 20* (A); Apr. 3† (A) (2); May 8†; May 22*; June 12† (2).
Johnston—Jan. 9† (A) (2); Feb. 13 (A); Feb. 20† (2); Mar. 6 (A); Mar. 13; Apr. 17 (A); Apr. 24† (2); June 26*.
Lee—Jan. 30† (A) (2); Mar. 27*; Apr. 3†; June 19† (A).
Wayne—Jan. 23; Jan. 30†; Feb. 6† (A); Mar. 6† (A) (2); Apr. 10; Apr. 17†; Apr. 24† (A); May 29; June 5†; June 12† (A).

FIFTH JUDICIAL DISTRICT
Judge Bone

Carteret—Mar. 13; June 12 (2).
Craven—Jan. 9; Jan. 30† (2); Feb. 13; Apr. 10; May 15†; June 5.
Greene—Feb. 27 (2); June 26.
Jones—Apr. 3.
Pamlico—May 1 (2).
Pitt—Jan. 16†; Jan. 23; Feb. 20†; Mar. 20 (2); Apr. 17 (2); May 8† (A); May 22† (2).

SIXTH JUDICIAL DISTRICT
Judge Parker

Duplin—Jan. 9† (2); Jan. 30*; Mar. 13† (2); Apr. 10† (2).
Lenoir—Jan. 23*; Feb. 20† (2); Apr. 24; May 15† (2); June 12† (2); June 26*.
Onslow—Mar. 6; May 29 (2).
Sampson—Feb. 6 (2); Mar. 27† (2); May 1† (2); June 12† (A) (2).

SEVENTH JUDICIAL DISTRICT
Judge Williams

Franklin—Jan. 23† (2); Feb. 13*; Apr. 17*; May 1† (2).
Wake—Jan. 9*; Jan. 16†; Jan. 23† (A) (2); Feb. 20† (2); Mar. 6* (2); Mar. 20† (2); Apr. 3*; Apr. 17† (A); Apr. 24†; May 1† (A); May 8* (A); May 15† (3); June 5* (2); June 19† (2).

EIGHTH JUDICIAL DISTRICT
Judge Frizzelle

Brunswick—Jan. 23; Apr. 3†; May 22.
Columbus—Jan. 9† (A) (2); Jan. 30* (2); Feb. 20† (2); May 8*; June 19.
New Hanover—Jan. 16*; Feb. 6† (A); Feb. 13†; Feb. 27* (A); Mar. 6*; Mar. 13† (2); Apr. 10† (2); May 15*; May 29† (2); June 12*.
Pender—Jan. 9; Mar. 27†; May 1.

NINTH JUDICIAL DISTRICT
Judge Stevens

Bladen—Jan. 9; Mar. 20*; May 1†.
Cumberland—Jan. 16*; Feb. 13† (2); Mar. 6* (A); Mar. 13*; Mar. 27† (2); May 1* (A); May 8† (2); June 5*.
Hoke—Jan. 23; Apr. 24.
Robeson—Jan. 16† (A) (2); Jan. 30* (2); Feb. 27† (2); Mar. 20* (A); Apr. 10* (2); Apr. 24† (A); May 8* (A) (2); May 22† (2); June 12†; June 19*.

TENTH JUDICIAL DISTRICT
Judge Harris

Alamance—Jan. 30† (A); Feb. 27*; Apr. 3†; May 15* (A); May 29† (2).
Durham—Jan. 9*; Jan. 16† (2); Jan. 30† (A); Feb. 20*; Feb. 27† (A); Mar. 6† (2); Mar. 20† (A); Mar. 27*; Apr. 3* (A); Apr. 10† (A) (3); May 1† (2); May 22*; May 29† (A) (3); June 26*.
Granville—Feb. 6 (2); Apr. 10 (2).
Orange—Mar. 20; May 15†; June 12; June 19†.
Person—Jan. 30; Feb. 6† (A); Apr. 24.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT
Judge Clement

Ashe—Apr. 17*; May 29† (2).
Alleghany—Jan. 30 (A); May 1.
Forsyth—Jan. 9* (2); Jan. 16† (A); Jan. 23† (2); Feb. 6* (2); Feb. 13† (A); Feb. 20† (2); Mar. 6* (2); Mar. 13† (A); Mar. 20† (2); Apr. 3* (2); Apr. 17 (A); Apr. 24; May 1 (A); May 15* (2); May 29† (A) (2); June 12* (2); June 19† (A) (2).

TWELFTH JUDICIAL DISTRICT
Judge Sink

Davidson—Jan. 30; Feb. 20† (2); Apr. 10† (A) (2); May 8; May 29† (A) (2); June 26.
Guilford—Greensboro Division—Jan. 9*; Jan. 16† (2); Feb. 6* (2); Feb. 20† (A) (2); Mar. 6*; Mar. 27*; Apr. 3† (2); Apr. 17† (2); Apr. 24* (A); May 22*; June 5† (2); June 19*.
Guilford—High Point Division—Jan. 16* (A); Feb. 13† (A); Mar. 13*; Mar. 20† (2); May 1*; May 15† (A) (2); May 29*.

THIRTEENTH JUDICIAL DISTRICT
Judge Phillips

Anson—Jan. 16*; Mar. 6†; Apr. 17 (2); June 12†.
Moore—Jan. 23*; Feb. 13†; Mar. 27†; May 22*; May 29†.
Richmond—Jan. 9*; Feb. 6† (A); Mar. 20†; Apr. 10*; May 29† (A); June 19†.
Scotland—Mar. 13; May 1†.
Stanly—Feb. 6†; Feb. 13† (A); Apr. 3; May 15†.
Union—Feb. 20 (2); May 8.

FOURTEENTH JUDICIAL DISTRICT
Judge Gwyn

Gaston—Jan. 16*; Jan. 23† (2); Mar. 13* (A); Mar. 20† (2); Apr. 24*; May 22† (A) (2); June 5*.
Mecklenburg—Jan. 9*; Jan. 9† (A) (2); Jan. 23* (A) (2); Jan. 23† (A) (2); Feb. 6† (A) (2); Feb. 6† (3); Feb. 20† (A) (2); Feb. 27*; Mar. 6† (2); Mar. 6† (A) (2); Mar. 20† (A) (2); Mar. 20* (A) (2); Apr. 3† (2); Apr. 3† (A) (2); Apr. 17* (A); Apr. 17†; Apr. 24† (A); May 1† (2); May 1† (A) (2); May 15*; May 15† (A) (2); May 22† (2); May 29† (A) (2); June 12† (A) (2); June 12*; June 19†; June 26* (2).

FIFTEENTH JUDICIAL DISTRICT
Judge Bobbitt

Alexander—Jan 23 (A) (2).
Cabarrus—Jan. 9 (2); Feb. 27†; Mar. 6† (A); Apr. 24 (2); June 12† (2).
Iredell—Jan. 30 (2); Mar. 13†; May 22 (2).
Montgomery—Jan. 23*; Apr. 10† (2).
Randolph—Jan. 30† (A) (2); Mar. 20† (2); Apr. 3*; June 26*.
Rowan—Feb. 13 (2); Mar. 6†; Mar. 13† (A); May 8 (2).

SIXTEENTH JUDICIAL DISTRICT
Judge Armstrong

Burke—Feb. 20; Mar. 13 (2); June 5 (3).
Caldwell—Jan. 9† (A) (2); Feb. 27 (2); May 8 (A); May 22† (2); June 5† (A) (2).
Catawba—Jan. 16† (2); Feb. 6 (2); Apr. 10† (2); May 8† (2).
Cleveland—Jan. 9; Mar. 27 (2); May 22† (A) (2).
Lincoln—Jan 23 (A); Jan. 30†.
Watauga—Apr. 24*; June 12† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT
Judge Rudisill

Avery—Apr. 17 (2).
Davie—Mar. 27; May 29†.
Mitchell—Apr. 3 (2).
Wilkes—Jan. 16† (3); Mar. 6 (3); May 1† (2); June 5 (2); June 19† (2).
Yadkin—Feb. 6 (3).

EIGHTEENTH JUDICIAL DISTRICT
Judge Rousseau

Henderson—Jan. 9† (2); Mar. 6 (2); May 1† (2); May 29† (2).
McDowell—Jan. 16* (A); Feb. 13† (2); June 12 (2).
Polk—Jan. 30 (2).
Rutherford—Feb. 27†; Apr. 17† (2); May 15 (2); June 26† (2).
Transylvania—Apr. 3 (2).
Yancey—Jan. 23†; Mar. 20 (2).

NINETEENTH JUDICIAL DISTRICT
Judge Pless

Buncombe—Jan. 9† (2); Jan. 16 (A) (2); Jan. 23*; Jan. 30; Feb. 6† (2); Feb. 20 (A) (2); Feb. 20*; Mar. 6† (2); Mar. 20*; Mar. 20 (A) (2); Apr. 3† (2); Apr. 17*; Apr. 17 (A) (2); May 1; May 8† (2); May 22*; May 22 (A) (2); June 5† (2); June 19*; June 19 (A) (2).
Madison—Jan. 30† (A); Feb. 27; Apr. 3 (A) (2); May 29; June 26.

TWENTIETH JUDICIAL DISTRICT
Judge Nettles

Cherokee—Jan. 23† (2); Apr. 3 (2); June 19† (2).
Clay—May 1.
Graham—Jan. 9† (A) (2); Mar. 20 (2); June 5† (2).
Haywood—Jan. 9† (2); Feb. 6 (2); May 8† (2).
Jackson—Feb. 20 (2); May 22 (2); June 12† (A).
Macon—Apr. 17 (2).
Swain—Jan. 16† (A) (2); Mar. 6 (2).

TWENTY-FIRST JUDICIAL DISTRICT
Judge Moore

Caswell—Mar. 20 (2).
Rockingham—Jan. 23* (2); Mar. 6†; Mar. 13*; Apr. 17†; May 8† (2); May 22* (2); June 12† (2).
Stokes—Jan. 2*; Apr. 3*; Apr. 10†; June 26*.
Surry—Jan. 9 (2); Feb. 13; Feb. 20 (2); Apr. 24 (2); June 5.

*For criminal cases.
†For civil cases.
‡For jail and civil cases.
(A) Special or Emergency Judge to be assigned.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—DON GILLIAM, *Judge*, Wilson.
Middle District—JOHNSON J. HAYES, *Judge*, Greensboro.
Western District—WILSON WARLICK, *Judge*, Newton.

EASTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Raleigh, Civil and criminal term, second Monday in March and September; criminal term, fourth Monday after the second Monday in March and September. A. HAND JAMES, Clerk.

Fayetteville, third Monday in March and September. T. L. HON, Deputy Clerk.

Elizabeth City, third Monday after the second Monday in March and September. SADIE A. HOOPER, Deputy Clerk, Elizabeth City.

Washington, sixth Monday after the second Monday in March and September. GEO. TAYLOR, Deputy Clerk, Washington.

New Bern, fifth Monday after the second Monday in March and September. MATILDA H. TURNER, Deputy Clerk, New Bern.

Wilson, eighth Monday after the second Monday in March and September. MRS. EVA L. YOUNG, Deputy Clerk, Wilson.

Wilmington, tenth Monday after the second Monday in March and September. J. DOUGLAS TAYLOR, Deputy Clerk, Wilmington.

OFFICERS

JOHN HALL MANNING, U. S. Attorney, Raleigh, N. C.
HOWARD H. HUBBARD, Clinton, LOGAN D. HOWELL, Raleigh, N. C., Assistant United States Attorneys.
F. S. WORTHY, United States Marshal, Raleigh.
A. HAND JAMES, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

Terms—District courts are held at the time and place as follows:

Durham, fourth Monday in September and first Monday in February. HENRY REYNOLDS, Clerk, Greensboro.

Greensboro, first Monday in June and December. HENRY REYNOLDS, Clerk; MYRTLE D. COBB, Chief Deputy; LILLIAN HARKRADER, Deputy Clerk; P. H. BEESON, Deputy Clerk; MAUDE B. GRUBB, Deputy Clerk.

Rockingham, first Monday in March and September. HENRY REYNOLDS, Clerk, Greensboro.

Salisbury, third Monday in April and October. HENRY REYNOLDS, Clerk, Greensboro.

Winston-Salem, first Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro; ELLA SHORE, Deputy Clerk.

Wilkesboro, third Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro; C. H. COWLES, Deputy Clerk.

OFFICERS

BRYCE R. HOLT, United States District Attorney, Greensboro.
R. KENNEDY HARRIS, Assistant United States Attorney, Greensboro.
MISS EDITH HAWORTH, Assistant United States Attorney, Greensboro.
THEODORE C. BETHEA, Assistant United States Attorney, Reidsville.
WILLIAM D. KIZZIAH, United States Marshal, Greensboro, N. C.
HENRY REYNOLDS, Clerk United States District Court, Greensboro.

WESTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Asheville, second Monday in May and November. OSCAR L. MCLURD, Clerk; WILLIAM A. LYTLE, Chief Deputy Clerk; VERNE E. BARTLETT, Deputy Clerk; MRS. NOREEN WARREN FREEMAN, Deputy Clerk.

Charlotte, first Monday in April and October. CHAS. A. RHINEHART, Deputy Clerk, Charlotte.

Statesville, Third Monday in March and September. ANNIE ADERHOLDT, Deputy Clerk.

Shelby, Third Monday in April and third Monday in October. OSCAR L. MCLURD, Clerk.

Bryson City, fourth Monday in May and November. OSCAR L. MCLURD, Clerk.

OFFICERS

THOS. A. UZZELL, JR., United States Attorney, Asheville.
FRANCIS H. FAIRLEY, Assistant United States Attorney, Charlotte.
JAMES B. CRAVEN, JR., Assistant United States Attorney, Asheville.
JACOB C. BOWMAN, United States Marshal, Asheville.
OSCAR L. MCLURD, Clerk United States District Court, Asheville.

LICENSED ATTORNEYS

SPRING TERM, 1950.

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed examinations of the Board of Law Examiners as of the 10th day of March, 1950:

BASON, WILLIAM ASHE	Raleigh
BLANCHARD, CHARLES FULLER	Raleigh
BOOE, WILLIAM HARDING	Charlotte
BOULDIN, JOSEPH EDMUNDS	Oxford
BRASWELL, JUNE RAY	Newland
BROUGHTON, JOSEPH MELVILLE, JR.	Raleigh
BROWN, GLENN WILLIAM	Clyde
CANADAY, HARRY EDSEL	Benson
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COLE, GENE PORTER	Charlotte
CRAFT, WILLIAM EARL	Greenville
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DOBY, HENRY CALVIN, JR.	Albemarle
EGGERS, STACY CLYDE, JR.	Asheville
ESSER, GEORGE HYNDMAN, JR.	Chapel Hill
FINCH, BAXTER HERMAN	Spring Hope
FRANKS, JOSEPH DANIEL, JR.	Elon College
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HOFMANN, FREDERIC	Raleigh
HOLLEMAN, CARL PARTIN	Raleigh
HOLLOWAY, FULLER	Durham
HOLT, DUNCAN WALDO, JR.	Greensboro
HORTON, ISAAC JOSEPH	Walstonburg
HOWERTON, ZACHARIAH HAMPTON, JR.	Greensboro
HOYLE, JAMES WOMBLE	Sanford
LEATHERMAN, CLARENCE EDWIN	Morganton
LONG, RICHARD GWYNN	Roxboro
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MULLEN, THOMAS MCGRATH	Greensboro
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PARKER, DANIEL LOUIS	Smithfield
PARKER, WILLIAM GALE	Aulander
PEEDIN, JUNIUS HUGH	Fayetteville
PERDUE, ROBERT WILLIAMSON	Asheville
PERRY, ROBERT EDWARD, JR.	Greensboro

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POWE, EDWARD KNOX, III.....Durham
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SIMMS, JOHN MEREDITH.....Raleigh
SPEARS, MARSHALL TURNER, JR.....Durham
STOCKTON, RALPH MADISON, JR.....Winston-Salem
STOREY, WILLIAM MARION.....Raleigh
STRAYHORN, RALPH NICHOLS, JR.....Durham
SULLIVAN, KIRBY.....Leland

TOTHEROW, CLARK CANARA.....Winston-Salem

WATSON, WILLIAM HENLEY.....Winston-Salem
WATTS, WILLIAM ALLEN, JR.....Statesville
WEBB, WILLIAM BAXTER.....Charlotte
WOMBLE, GEORGE MORGAN.....Wake Forest

ZOLLICOFFER, ALGERNON AUGUSTUS, JR.....Henderson

BY COMITY

BAER, HERBERT RALPH.....Chapel Hill, from New York
MELTON, WILLIAM DAVIS, JR.....Charlotte, from South Carolina

Given over my hand and the seal of the Board of Law Examiners, this 23rd day of May, 1950.

EDWARD L. CANNON, *Secretary*

CASES REPORTED

A

PAGE

Abernethy, Caldwell v. ... 692
Abrams, Cotton Mills v. ... 431
Acme Benevolent Asso., Lodge v. ... 522
Adoption of Doe, *In re* ... 1
Aetna Insurance Co., Meekins v. ... 452
Allen v. Costner ... 340
Andrews, Cherry v. ... 261
Ashley, S. v. ... 508
Atkinson-Clark Canal Co., *In re*, 131
Atlantic Coast Line R. R., Hill v. 499
Atlantic States Motor Lines, Colyar v. ... 318

B

Bach, Neill v. ... 391
Bahnson Co., Puett v. ... 711
Bailey v. Davis ... 86
Bailey v. Michael ... 404
Baker, Cooley v. ... 533
Baker, S. v. ... 136
Bakeries, Brothers v. ... 428
Banks v. Bland ... 26
Bank v. Brawley ... 687
Bank v. Sherrill ... 731
Bank & Trust Co. v. Casualty Co. 510
Bank & Trust Co., Nichols v. ... 158
Barfield, Langston v. ... 594
Barlow v. Benfield ... 663
Barnes, Bengel v. ... 667
Barnes, Ellis v. ... 543
Barrier v. Troutman ... 47
Battle, Mitchell v. ... 68
Bell Bakeries, Brothers v. ... 428
Benevolent Asso., Lodge v. ... 522
Benfield, Barlow v. ... 663
Bengel v. Barnes ... 667
Bingham, Howard v. ... 420
Bland, Land Bank v. ... 26
Blue Ridge Electric Membership Corp v. Grannis Bros. ... 716
Board of Education v. Lewis ... 661
Bobbitt v. Haynes ... 373
Bobo, Fawley v. ... 203
Boone, Burnsville v. ... 577
Boone, Moore v. ... 494
Bowie v. West Jefferson ... 408
Bowman, Light Co. v. ... 332
Bowman, S. v. ... 51
Brawley, Bank v. ... 687
Bridges, S. v. ... 163

PAGE

Bright Belt Warehouse Assn. v. Warehouse ... 142
Brinson, Jones v. ... 63
Britt, Hill v. ... 713
Britt Corp., Culbreth v. ... 76
Brooks, S. v. ... 414
Brothers v. Bakeries ... 428
Browder v. Winston-Salem ... 400
Brown, S. v. ... 152
Brown v. Vestal ... 56
Bruce v. Flying Service ... 181
Bryant, S. v. ... 106
Builders Supply Co. v. Rivenbark 213
Building & Loan Asso., McCampbell v. ... 647
Bumgarner v. Bumgarner ... 600
Burlington Chamber of Commerce, Horner v. ... 440
Burnsville v. Boone ... 577
Burton, Foster v. ... 714
Butane Gas Co., Graham v. ... 680

C

Caldwell v. Abernethy ... 692
Cameron v. Cameron ... 123
Cameron, McKay v. ... 658
Canal Co., *In re* ... 131
Canestrino v. Powell ... 190
Capital Ice & Coal Co., Terry v. ... 103
Carolina Casualty Insurance Co., Moore v. ... 729
Carolina Coach Co., Townsend v. 81
Carolina Power & Light Co. v. Bowman ... 332
Carolina Power & Light Co., Eledge v. ... 737
Carolina Virginia Coastal Corp., Penn v. ... 481
Carpenter, S. v. ... 229
Carpenter, S. v. ... 735
Carpenter v. Yancey ... 160
Carson v. Doggett ... 629
Casstevens v. Casstevens ... 572
Casualty Co., Trust Co. v. ... 510
Casualty Insurance Co., Moore v. 729
Chamber of Commerce, Horner v. 440
Chase, S. v. ... 589
Chavis, S. v. ... 307
Cherry v. Andrews ... 261

	PAGE
Chesson, Phillips v.	566
Church, S. v.	39
City Coach Co., Jenkins v.	208
City of Burlington, Horner v.	440
City of Durham, Veazey v.	354
City of Durham, Veazey v.	357
City of Gastonia, Stowe v.	157
City of Wilmington v. Merrick	297
City of Winston-Salem, Browder v.	400
Clark v. Construction Co.	217
Clodfelter v. Gas Corp.	343
Clontz v. Purser	162
Coach Co., Herring v.	430
Coach Co., Jenkins v.	208
Coach Co., Townsend v.	81
Coal Co., Terry v.	103
Coastal Corp., Penn v.	481
Colyar v. Motor Lines	318
Combs v. Porter	585
Comrs. of Durham, Hospital v.	604
Comrs. of Johnston, Worley v.	592
Cone Memorial Hospital v. Cone	292
Cone, S. v.	467
Construction Co., Clark v.	217
Cook, S. v.	617
Cooley v. Baker	533
Costner, Allen v.	340
Coston v. Hotel	546
Cotton Mills v. Abrams	431
Cotton Mills, Steele v.	636
Craddock, Sutton v.	669
Cranford, *In re*	91
Cranford, S. v.	211
Culbreth v. Britt Corp.	76

D

Daniels, S. v.	17
Daniels, S. v.	341
Daniels, S. v.	509
Dark v. Graham	735
Davis, Bailey v.	86
Davis v. Department of Motor Vehicles	447
Davis v. Rhodes	71
Davis, S. v.	664
Davis Hospital v. Joint Committee on Standardization	735
Deneen, McKinney v.	540
Department of Motor Vehicles, Davis v.	447
Department of Motor Vehicles, Galloway v.	447
Doe, *In re* Adoption of	1
Doggett, Carson v.	629
Doggett, Ward v.	629
Dover, S. v.	735
Drum, Parlier v.	155
Duke Power Co., Gray v.	423
Durham, Veazey v.	354
Durham, Veazey v.	357
Durham, Comrs. of, Hospital v.	604

E

Electric Co., Foy v.	161
Electric Membership Corp. v. Grannis Bros.	716
Eledge v. Light Co.	737
Elevator Co., Jones v.	285
Elliott v. Swartz Industries	425
Ellis v. Barnes	543
Employment Security Com. v. Jarrell	381
Employment Security Com. v. Whitehurst	497
Etheridge, *In re* Will of	502

F

Farmers Bank v. Sherrill	731
Fawley v. Bobo	203
Fidelity & Casualty Co., Trust Co. v.	510
Fields, Sutton v.	669
Finance Co. v. Luck	110
Finishing Works, Wellington-Sears Co, v.	96
First National Bank v. Brawley	687
Flying Service, Bruce v.	181
Ford v. Moulding Co.	105
Foster v. Burton	714
Foy v. Electric Co.	161
Franks, *In re* Will of	252
Franks, *In re* Will of	736
Frazier, Lindley v.	44

G

Galloway v. Department of Motor Vehicles	447
Gas Co., Graham v.	680
Gas Co. v. Montgomery Ward & Co.	270
Gas Corp., Clodfelter v.	343
Gastonia, Stowe v.	157
Gates, King v.	537
Gibson v. Lackey	342

PAGE

Goins v. McLoud 655
Goldston, Hix v. 581
Goldston, Nichols v. 581
Good Friend Corp., Schueler v. 416
Gordon v. Sprott 472
Graham, Dark v. 735
Graham v. Gas Co. 680
Grannis Bros., Electric Membership Corp. v. 716
Gray v. Power Co. 423
Green v. Green 707
Grier, Hollingsworth v. 108

H

Hale, S. v. 412
Hart Cotton Mills v. Abrams 431
Haynes, Bobbitt v. 373
Heller, S. v. 67
Helms, Parker v. 334
Henderson Tobacco Co., Jones v... 336
Henry v. Leather Co. 477
Henson v. Thomas 173
Herring v. Coach Co. 430
Higdon v. Jaffa 242
Hightower v. Thompson 491
Highway Patrol, Davis v. 447
Highway Patrol, Galloway v. 447
Hill v. Britt 713
Hill v. R. R. 499
Hix v. Goldston 581
Hollar, S. v. 419
Hollingsworth v. Grier 108
Horner v. Chamber of Commerce.. 440
Hospital v. Comrs. of Durham.... 604
Hospital v. Cone 292
Hospital v. Joint Committee on Standardization 735
Hotel, Coston v. 546
House v. House 218
Howard v. Bingham 420
Howland v. Stitzer 528

I

Ice & Coal Co., Terry v. 103
In re Adoption of Doe 1
In re Canal Co. 131
In re Cranford 91
In re Estate of Pitchi 485
In re Publishing Co. 395
In re Will of Etheridge 502
In re Will of Franks 252
In re Will of Franks 736

PAGE

In re Will of Winborne 463
In re Wingler 560
In re Will of York 70
Ingram, Powell v. 427
Ingram, Stancell v. 427
Insurance Co., Meekins v. 452
Insurance Co., Moore v. 729
Insurance Co., Pegram-West v..... 277
Insurance Co., Stallings v. 732
Interstate Construction Co., Clark v. 217
Iselin & Co. v. Saunders 642

J

Jacobs, S. v. 307
Jaffa, Higdon v. 242
James v. Rogers 668
Jarrell, Employment Security Com. v. 381
Jenkins v. Coach Co. 208
Jernigan, S. v. 338
Jocie Motor Lines, Johnson v. 367
Johnson, Motor Lines v. 367
Johnson v. Orrell 197
Johnston County, Worley v..... 592
Joint Committee on Standardization, Hospital v. 735
Jones v. Brinson 63
Jones v. Elevator Co. 285
Jones, Moser v. 344
Jones, S. v. 216
Jones v. Tobacco Co. 336
Jordan v. Maynard 101

K

Kerr Bleaching & Finishing Works, Wellington-Sears Co. v. 96
King v. Gates 537
Kinston Transit Co., Knott v. 715
Knott v. Transit Co. 715

L

Lackey, Gibson v. 342
Lamm v. Shingleton 10
Land Bank v. Bland 26
Langdon, Perkins v. 386
Langston v. Barfield 594
LaPrade v. R. R. 343
Lawrence Leather Co., Henry v..... 477
Leather Co., Henry v. 477
Lee v. Rhodes 602
Lewis Board of Education v. 661

PAGE

Lide v. Mears 111
Life Insurance Co., Pegram-West v. 227
Life Insurance Co., Stallings v. 732
Light Co. v. Bowman 332
Light Co., Eledge v. 737
Lindley v. Frazier 44
Locke Cotton Mills, Steele v. 636
Lodge v. Benevolent Asso. 522
Long v. R. R. 734
Lowry, S. v. 414
Luck, Finance Co. v. 110

Mc

McCampbell v. Building & Loan Asso. 647
McCraw, *In re* Adoption of Doe.... 1
McDevitt, Roberts v. 458
McDowell v. Staley 65
McIver, S. v. 313
McKay v. Cameron 658
McKinney v. Deneen 540
McLoud, Goins v. 655
McMahon, S. v. 211
McNeill, S. v. 666

M

Macon v. Murray 61
Masons v. Benevolent Asso. 522
Matthews, S. v. 617
Maynard, Jordan v. 101
Mears, Lide v. 111
Mecklenburg County, R. R. v. 148
Medlin, S. v. 162
Meekins v. Insurance Co. 452
Memorial Hospital v. Cone 292
Merchants & Farmers Bank v. Sherrill 731
Merrick, Wilmington v. 297
Merritt, S. v. 59
Michael, Bailey v. 404
Miller, S. v. 419
Miller, Williamson v. 722
Mitchell v. Battle 68
Montague Brothers v. Shepherd Co. 551
Montgomery Ward & Co., Gas Co. v. 270
Moore v. Benfield 663
Moore v. Boone 494
Moore v. Insurance Co. 729
Mordecai v. R. R. 733

PAGE

Morgan, Scarboro v. 597
Morrow, Prentzas v. 330
Morse, City-County Tax Collector, v. Merrick 297
Moser v. Jones 344
Moses H. Cone Memorial Hospital v. Cone 292
Motor Lines, Colyar v. 318
Motor Lines v. Johnson 367
Moulding Co., Ford v. 105
Murray, Macon v. 61

N

National Bank v. Brawley 687
Neill v. Bach 391
New Hanover County v. Merrick .. 297
Nichols v. Goldston 581
Nichols v. Trust Co. 158
Norfolk Southern R. R. Mordecai v. 733
N. C. Butane Gas Co., Graham v... 680
N. C. Employment Security Com. v. Jarrell 381
N. C. Employment Security Com. v. Whitehurst 497
N. C. Gas Corp., Clodfelter v. 343
N. C. Joint Stock Land Bank v. Bland 26
N. C. R. R., LaPrade v. 343
North State Finance Co. v. Luck.. 110
Nowell, Penny v. 154

O

Occidental Life Insurance Co., Stallings v. 732
O'Neal Flying Service, Bruce v. .. 181
Orrell, Johnson v. 197
Otis Elevator Co., Jones v. 285
Ottoway, Raynor v. 99

P

Parker v. Helms 334
Parlier v. Drum 155
Parsons, S. v. 599
Pegram-West v. Ins. Co. 277
Penland, Towe v. 504
Penn v. Coastal Corp. 481
Pennell, S. v. 651
Penny v. Nowell 154
Peoples Bank & Trust Co. v. Casualty Co. 510
Perkins v. Langdon 386

	PAGE
Perkins v. Sykes	488
Perry, S. v.	467
Phillips v. Chesson	566
Pitchi, *In re* Estate of	485
Pittman v. Stanley	327
Planters Warehouse, Warehouse Assn. v.	142
Port Publishing Co., *In re*	395
Porter, Combs v.	585
Powell, Canestrino v.	190
Powell, v. Ingram	427
Power Co., Gray v.	423
Power & Light Co. v. Bowman	332
Power & Light Co., Eledge v.	737
Powers, S. v.	39
Prentzas v. Morrow	330
Publishing Co., *In re*	395
Puett v. Bahnson Co.	711
Purser, Clontz v.	162

Q

Queen City Coach Co., Herring v.	430
Quinerly, Sutton v.	669

R

R. R., Hill v.	499
R. R., LaPrade v.	343
R. R., Long v.	734
R. R., v. Mecklenburg County	148
R. R., Moredcai v.	733
R. R., Receivers of, Canestrino v.	190
Raynor v. Ottoway	99
Reece v. Reece	321
Rhodes, Davis v.	71
Rhodes, Lee v.	602
Rich, S. v.	696
Rivenbark, Supply Co. v.	213
Roberts v. McDevitt	458
Robertson, S. v.	211
Rogers, James v.	668
Rulane Gas Co. v. Montgomery Ward & Co.	270

S

Sanderson, S. v.	414
Saunders, Iselin & Co. v.	642
Scarboro v. Morgan	597
Scarboro v. Scarboro	597
Schueler v. Good Friend Corp.	416
Seaboard Air Line R. R., Long v.	734
Seaboard Air Line Railway, Receivers of, Canestrino v.	190
Seashore Transportation Co., Whiteman v.	701
Sheffield v. Walker	556
Shepherd, Montague Brothers v.	551
Sherrill, Bank v.	731
Shingleton, Lamm v.	10
Sinclair v. Travis	345
Skyland Hotel, Coston v.	546
Smith, Treasurer of Mecklenburg County, R. R. v.	148
Smith Builders Supply Co. v. Rivenbark	213
Southern R. R., LaPrade v.	343
Southern Railway Co. v. Mecklenburg County	148
Speller, S. v.	549
Sprott, Gordon v.	472
Staley, McDowell v.	65
Stallings v. Insurance Co.	732
Stancell v. Ingram	427
Stanley , Pittman v.	327
S. v. Ashley	508
S. v. Baker	136
S. v. Bowman	51
S. v. Bridges	163
S. v. Brooks	414
S. v. Brown	152
S. v. Bryant	106
S. v. Carpenter	229
S. v. Carpenter	735
S. v. Chase	589
S. v. Chavis	307
S. v. Church	39
S. v. Cone	467
S. v. Cook	617
S. v. Cranford	211
S. v. Daniels	17
S. v. Daniels	341
S. v. Daniels	509
S. v. Davis	664
S. v. Dover	735
S. v. Hale	412
S. v. Heller	67
S. v. Hollar	419
S. v. Jacobs	307
S. v. Jernigan	338
S. v. Jones	216
S. v. Lowry	414
S. v. McIver	313
S. v. McMahon	211
S. v. McNeill	666

PAGE

S. v. Matthews 617
S. v. Medlin 162
S. v. Merritt 59
S. v. Miller 419
S. v. Parsons 599
S. v. Pennell 651
S. v. Perry 467
S. v. Powers 39
S. v. Rich 696
S. v. Robertson 211
S. v. Sanderson 414
S. v. Speller 549
S. v. Stinnett 735
S. v. Stone 324
S. v. Streeton 301
S. v. Strickland 414
S. v. Swinney 506
S. v. Taylor 735
S. v. Tilley 734
S. v. Vinson 603
S. v. Way 716
S. v. Williams 214
S. v. Wyatt 39
State ex rel. Barlow v. Benfield 663
State ex rel. Employment Security Com. v. Jarrell 381
State ex rel. Employment Security Com. v. Whitehurst 497
State ex rel. Roberts v. McDevitt 458
State Highway Patrol, Davis v. .. 447
State Highway Patrol, Galloway v. 447
Steele v. Cotton Mills 636
Stinnitt, S. v. 735
Stitzer, Howland v. 528
Stone, S. v. 324
Stowe v. Gastonia 157
Streeton, S. v. 301
Strickland, S. v. 414
Supply Co. v. Rivenbark 213
Sutton v. Craddock 669
Sutton v. Fields 669
Sutton v. Quinerly 669
Swartz Industries, Elliott v. 425
Swinney, S. v. 506
Sykes, Perkins v. 488

T

Taylor, S. v. 735
Terry v. Coal Co. 103
Thomas, Henson v. 173
Thompson, Hightower v. 491

PAGE

Tilley, S. v. 734
Tobacco Co., Jones v. 336
Tobacco Planters Warehouse, Warehouse Assn. v. 142
Towe v. Penland 504
Town of Burnsville v. Boone 577
Town of West Jefferson, Bowie v. 408
Townsend v. Coach Co. 81
Transit Co., Knott v. 715
Transportation Co., Whiteman v. 701
Travis, Sinclair v. 345
Troutman, Barrier v. 47
Trust Co. v. Casualty Co. 510
Trust Co., Nichols v. 158
Trustees of Watts Hospital v. Comrs. of Durham 604

V

Valdese Building & Loan Asso., McCampbell v. 647
Veazey v. Durham 354
Veazey v. Durham 357
Venus Lodge v. Benevolent Asso. 522
Vestal, Brown v. 56
Vinson, S. v. 603

W

Wachovia Bank & Trust Co., Nichols v. 158
Walker, Sheffield v. 556
Walker v. Walker 54
Ward v. Doggett 629
Warehouse Assn. v. Warehouse .. 142
Watts Hospital v. Comrs. of Durham 604
Way, S. v. 716
Wayne County Board of Education v. Lewis 661
Wellington-Sears Co. v. Finishing Works 96
West Jefferson, Bowie v. 408
Whitehurst, Employment Security Com. v. 497
Whiteman v. Transportation Co. 701
Williams, S. v. 214
Williams v. Williams 33
Williamson v. Miller 722
Wilmington v. Merrick 297
Winborne, *In re* Will of 463

	PAGE
Wingler, *In re*	560
Winston Mutual Life Ins. Co., Pegram-West v.	277
Winston-Salem, Browder v.	400
Worley v. Johnston County	592
Wyatt, S. v.	39
Y	
Yancey, Carpenter v.	160
York, *In re* Will of	70

CASES ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES.

Hill v. R. R., N. C. 499. On petition for *certiorari.*

S. v. Matthews and Cook, 231 N. C. 617. On petition for *certiorari.*

S. v. Daniels, 231 N. C. 17; 231 N. C. 341; 231 N. C. 509. On petition for *certiorari.*

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

S. v. Bridges, 231 N. C. 163. Petition for *certiorari* denied 17 April, 1950.

S. v. Carpenter, 231 N. C. 735. Petition for *certiorari* denied 10 April, 1950.

S. v. Dover, 231 N. C. 735. Petition for *certiorari* denied 10 April, 1950.

S. v. Stinnett, 231 N. C. 735. Petition for *certiorari* denied 10 April, 1950.

CASES CITED

A

Abee, *In re*.....146 N.C. 273..... 260
Abrams v. Ins. Co.....223 N.C. 500..... 730
Abrams v. Ins. Co.....224 N.C. 1..... 730
Adams v. R. R.....110 N.C. 325..... 570, 571
Adams v. Utley..... 87 N.C. 356..... 403
Airport Authority v. Johnson.....226 N.C. 1..... 50
Aldridge v. Ins. Co.....194 N.C. 683..... 30
Alexander v. Alexander.....120 N.C. 472..... 362
Alexander v. Lindsey.....230 N.C. 663..... 632, 636
Alexander v. Norwood.....118 N.C. 381..... 323
Allen v. Allen.....213 N.C. 264..... 505
Allen v. Baker..... 86 N.C. 91..... 15
Allen v. Hunnicutt.....230 N.C. 49..... 175
Allen v. R. R.....120 N.C. 548..... 74, 75
Allen v. Salley.....179 N.C. 147..... 323
Allison v. Sharp.....209 N.C. 477..... 117
Amick v. Coble.....222 N.C. 484..... 639
Anderson v. Amusement Co.....213 N.C. 130..... 548
Anderson v. Waynesville.....203 N.C. 37..... 50
Annuity Co. v. Costner.....149 N.C. 293..... 397
Anthony v. Smith..... 45 N.C. 188..... 709
Archie v. Lumber Co.....222 N.C. 477..... 452, 713
Armstrong v. Comrs. of Gaston 185 N.C. 405..... 616
Arps v. Davenport.....183 N.C. 72..... 56
Ashby v. Page.....106 N.C. 328.....9, 92, 95
Askew v. Matthews.....175 N.C. 187..... 352
Assurance Society v. Lazarus.....207 N.C. 63..... 579
Atkins v. McAden.....229 N.C. 752..... 594, 663
Atkins v. Transportation Co.....224 N.C. 688..... 496
Austin v. Overton.....222 N.C. 89..... 496

B

Bailey v. Jackson.....191 N.C. 61.....247, 248, 250
Bailey v. Michael.....231 N.C. 404..... 422
Baird v. Baird.....223 N.C. 730..... 693
Baker v. Pender..... 50 N.C. 351..... 220
Balcum v. Johnson.....177 N.C. 213..... 275
Baldwin, *In re* Will of.....146 N.C. 25..... 256
Ballard v. Ballard.....230 N.C. 629..... 525, 683
Ballinger v. Thomas.....195 N.C. 517..... 650
Bank v. Bynum..... 84 N.C. 24..... 647
Bank v. Cocke .....127 N.C. 467..... 74
Bank v. Corl.....225 N.C. 96..... 227
Bank v. Cox .....171 N.C. 76..... 554, 555, 559, 560
Bank v. Dortch .....186 N.C. 510..... 119
Bank v. Hall .....201 N.C. 787..... 38
Bank v. Ins. Co. .....223 N.C. 390..... 407
Bank v. Marshburn .....229 N.C. 104..... 519
Bank v. Murray .....175 N.C. 62..... 220
Bank v. Palmer .....153 N.C. 501..... 83

Bank v. Sturgill ..... 223 N.C. 825 333
Banks v. Shepard ..... 230 N.C. 86 535
Barcliff v. R. R. ..... 168 N.C. 268 570
Barclift v. R. R. ..... 175 N.C. 114 570
Barlow v. Bus Lines ..... 229 N.C. 382 ..... 407, 422, 496
Barnes v. Aycock ..... 219 N.C. 360 352
Barrington v. Skinner ..... 117 N.C. 48 554
Bass v. Bass ..... 229 N.C. 171 ..... 37, 55, 65
Battle v. Cleave ..... 179 N.C. 112 407
Battle v. Mayo ..... 102 N.C. 413 579
Beach v. McLean ..... 219 N.C. 521 479
Beach v. Patton ..... 208 N.C. 134 276
Beale v. Roberson ..... 29 N.C. 280 633
Beard v. Sovereign Lodge ..... 184 N.C. 154 456
Bechtler v. Bracken ..... 218 N.C. 515 535
Beck v. Bottling Co. ..... 216 N.C. 579 363
Belding v. Archer ..... 131 N.C. 287 584
Belk v. Belk ..... 175 N.C. 69 732
Belk's Dept. Store v. Ins. Co. ..... 208 N.C. 267 727
Bell v. Gillam ..... 200 N.C. 411 ..... 121, 394
Bell v. Thurston ..... 214 N.C. 231 690
Benjamin v. Teel ..... 33 N.C. 49 503
Bennett v. R. R. ..... 159 N.C. 345 319
Benton v. Collins ..... 121 N.C. 66 364
Berry v. R. R. ..... 155 N.C. 287 284
Best v. Garris ..... 211 N.C. 305 579
Best v. Kinston ..... 106 N.C. 205 319
Best v. Utley ..... 189 N.C. 356 732
Betts v. Raleigh ..... 142 N.C. 229 640
Betts v. Telegraph Co. ..... 167 N.C. 75 15
Blackmore v. Winders ..... 144 N.C. 212 74
Blue v. Wilmington ..... 186 N.C. 321 64
Board of Education v. High Point ..... 213 N.C. 636 494
Board of Education v. Forrest ..... 190 N.C. 753 ..... 662, 663
Board of Education v. Pegram ..... 197 N.C. 33 662
Bogen v. Bogen ..... 220 N.C. 648 538
Bohannon v. Trust Co. ..... 198 N.C. 702 363
Bolling v. Belk-White Co. ..... 228 N.C. 749 479
Bond v. R. R. ..... 175 N.C. 606 160
Booker v. Highlands ..... 198 N.C. 282 266
Boone v. Boone ..... 217 N.C. 722 ..... 195, 585
Bost v. Bost ..... 87 N.C. 477 71
Bouldin v. Davis ..... 197 N.C. 731 664
Bowling v. Bank ..... 209 N.C. 463 74
Bowling, *In re* Will of ..... 150 N.C. 507 255
Bowman v. Howard ..... 182 N.C. 662 8
Boyd v. Campbell ..... 192 N.C. 398 328
Boyer v. Jarrell ..... 180 N.C. 479 579
Bradburn v. Roberts ..... 148 N.C. 214 651
Braddy v. Pfaff ..... 210 N.C. 248 705
Bradley v. Church ..... 195 N.C. 662 119
Bradshaw v. Lumber Co. ..... 172 N.C. 219 266
Bradshaw v. Stansberry ..... 164 N.C. 356 227

Brandis v. Trustees of Davidson College ..... 227 N.C. 329 532
Branton v. O'Briant ..... 93 N.C. 99 579
Brenizer v. Stephens ..... 220 N.C. 395 ..... 247, 252
Brewer v. Wynne ..... 163 N.C. 319 635
Brick Co. v. Gentry ..... 191 N.C. 636 456
Brigman v. Baley ..... 213 N.C. 119 ..... 459, 460
Broach, *In re* Will of ..... 172 N.C. 520 ..... 71, 255, 259
Broadhurst v. Blythe Bros. Co. ..... 220 N.C. 464 572
Brock v. Scott ..... 159 N.C. 513 331
Brooks v. Britt ..... 15 N.C. 481 ..... 268, 269
Brooks v. Clement Co. ..... 201 N.C. 768 ..... 486, 487
Brown v. Brown ..... 25 N.C. 134 221
Brown v. Brown ..... 168 N.C. 4 660
Brown v. Bus Lines ..... 230 N.C. 493 ..... 208, 421
Brown v. Hall ..... 226 N.C. 732 156
Brown, *In re* Will of ..... 194 N.C. 583 71
Brown v. Mitchell ..... 207 N.C. 132 127
Brown v. Montgomery Ward & Co. ..... 217 N.C. 368 548
Brown v. Products Co. ..... 222 N.C. 626 211
Brown v. R. R. ..... 165 N.C. 392 ..... 569, 570
Brown v. R. R. ..... 202 N.C. 256 289
Brown v. Truck Lines ..... 227 N.C. 299 ..... 338, 372
Brown v. Truck Lines ..... 229 N.C. 122 211
Brown v. Turner ..... 70 N.C. 93 640
Bryan v. Eason ..... 147 N.C. 284 545
Bryant v. Shields ..... 220 N.C. 628 545
Bryant v. Stone ..... 178 N.C. 291 160
Buchanan v. Buchanan ..... 99 N.C. 308 ..... 220, 223, 226
Buchanan v. Clark ..... 164 N.C. 56 579
Buckner v. Wheeldon ..... 225 N.C. 62 693
Buffaloe v. Barnes ..... 226 N.C. 313 351
Buffaloe v. Barnes ..... 226 N.C. 778 351
Buford v. Mochy ..... 224 N.C. 235 732
Building & Loan Assn. v. Black ..... 215 N.C. 400 31
Bullard v. Johnson ..... 65 N.C. 436 390
Bullock v. Williams ..... 213 N.C. 320 736
Bunch v. Lumber Co. ..... 134 N.C. 116 661
Bundy v. Powell ..... 229 N.C. 707 ..... 407, 632
Bunker v. Bunker ..... 140 N.C. 18 362
Bunting v. Jones ..... 78 N.C. 242 214
Burbage v. Windley ..... 108 N.C. 357 397
Burcham v. Burcham ..... 219 N.C. 357 596
Burke v. Elliott ..... 26 N.C. 355 564
Burleson v. Board of Aldermen 200 N.C. 30 616
Burns, *In re* Will of ..... 121 N.C. 336 70
Burnsville v. Boone ..... 231 N.C. 577 599
Burton v. Patton ..... 47 N.C. 124 564
Bus Co. v. Products Co. ..... 229 N.C. 352 ..... 109, 208, 421, 476, 496
Butner v. Spease ..... 217 N.C. 82 ..... 275, 706
Byers v. Byers ..... 223 N.C. 85 333
Bynum v. Bank ..... 221 N.C. 101 351
Byrd v. Lumber Co. ..... 207 N.C. 253 479

C

Caho v. R. R. ..... 147 N.C. 20 74
Cahoon v. Brinkley ..... 176 N.C. 5 127
Cahoon v. Everton ..... 187 N.C. 369 90
Cameron v. McDonald ..... 216 N.C. 712 30
Cameron v. Power Co. ..... 138 N.C. 365 658
Campbell v. Allison ..... 63 N.C. 568 365
Campbell v. Cronley ..... 150 N.C. 457 329
Campbell v. Sigmon ..... 170 N.C. 348 64
Canal Co. v. Burnham ..... 147 N.C. 41 74
Cannon v. Blair ..... 229 N.C. 606 579
Cannon v. Cannon ..... 225 N.C. 611 ..... 597, 691
Cannon v. Mills Co. ..... 195 N.C. 119 639
Capps v. R. R. ..... 183 N.C. 181 ..... 74, 75, 319
Carleton v. Byers ..... 71 N.C. 331 ..... 364, 367, 426
Carlisle v. Carlisle ..... 225 N.C. 462 ..... 37, 64
Carroll v. Herring ..... 180 N.C. 369 690
Carroll v. Mfg. Co. ..... 180 N.C. 366 679
Carter v. Motor Lines ..... 227 N.C. 193 684
Cartwright v. Coppersmith ..... 222 N.C. 573 ..... 351, 352
Cashwell v. Bottling Works ..... 174 N.C. 324 274
Cauble v. Trexler ..... 227 N.C. 307 397
Caudle v. Benbow ..... 228 N.C. 282 636
Caudle v. Caudle ..... 206 N.C. 484 129
Caudle v. Morris ..... 158 N.C. 594 365
Causey v. Morris ..... 195 N.C. 532 584
Cement Co. v. Phillips ..... 182 N.C. 437 ..... 362, 490, 491
Chambers v. Kerns ..... 59 N.C. 280 709
Chancey v. R. R. ..... 171 N.C. 756 719
Chandler v. Cameron ..... 227 N.C. 233 661
Chandler v. Jones ..... 173 N.C. 427 195
Charlotte v. Cole ..... 223 N.C. 106 194
Charnock v. Taylor ..... 223 N.C. 360 ..... 196, 289, 693, 705
Chastain v. Coward ..... 79 N.C. 543 579
Chemical Co. v. Turner ..... 190 N.C. 471 446
Chemical Co. v. Walston ..... 187 N.C. 817 214
Cherry v. Andrews ..... 229 N.C. 333 ..... 261, 264
Cherry, *In re* Will of ..... 164 N.C. 363 70
Cherry v. Williams ..... 147 N.C. 452 50
Cheshire v. Drake ..... 223 N.C. 577 32
Cheshire v. Drewry ..... 213 N.C. 450 393
Chesser v. McCall ..... 230 N.C. 119 632
Chesson v. Container Co. ..... 216 N.C. 337 14
Chinnis v. R. R. ..... 219 N.C. 528 276
Chipley v. Morrell ..... 228 N.C. 240 195
Chisman, *In re* Will of ..... 175 N.C. 420 503
Chowan County v. Comr. of Banks ..... 202 N.C. 672 719
Citizens Co. v. Typographical Union ..... 187 N.C. 42 526
Clark v. Bonsal ..... 157 N.C. 270 103
Clark v. Drug Co. ..... 204 N.C. 628 548
Clevenger v. Grover ..... 212 N.C. 13 719
Clinard v. Kernersville ..... 215 N.C. 745 158
Clinton v. Ross ..... 226 N.C. 682 50

Clodfelter v. Gas Corp. ..... 231 N.C. 343 598
Coach Co. v. Lee ..... 218 N.C. 320 683
Cody v. Hovey ..... 219 N.C. 369 531
Cole v. Cole ..... 229 N.C. 757 394
Cole v. Koonce ..... 214 N.C. 188 422
Cole v. Lumber Co. ..... 230 N.C. 616 422
Cole v. Trust Co. ..... 221 N.C. 249 ..... 362, 490
Cole v. Wagner ..... 197 N.C. 692 641
Coley v. Dalrymple ..... 225 N.C. 67 56
Collins v. Ins. Co. ..... 79 N.C. 279 456
Collins v. Lamb ..... 215 N.C. 719 ..... 588, 705
Collins v. Wooten ..... 212 N.C. 359 366
Colvard v. Comrs. of Graham ..... 95 N.C. 515 640
Colyar v. Motor Lines ..... 231 N.C. 318 408
Combes v. Adams ..... 150 N.C. 64 363
Comrs. of New Hanover v. Stedman ..... 141 N.C. 448 151
Comrs. of Trenton v. McDaniel ..... 52 N.C. 107 564
Comrs. of Washington v. Gaines 221 N.C. 324 299
Conley v. Pearce-Young-Angel Co. ..... 224 N.C. 211 ..... 423, 535 706
Conley v. R. R. ..... 109 N.C. 692 75
Construction Co. v.R R. R. ..... 185 N.C. 43 572
Cook v. Cook ..... 159 N.C. 46 331
Cook v. Mebane ..... 191 N.C. 1 542
Cooley v. Lee ..... 170 N.C. 18 ..... 121, 394
Cooper, *In re* Will of ..... 223 N.C. 34 259
Cooper v. Middleton ..... 94 N.C. 86 579
Corbett v. Lumber Co. ..... 223 N.C. 704 651
Cory v. Cory ..... 205 N.C. 205 211
Coston, *In re* ..... 187 N.C. 509 93
Cotton v. Transportation Co. ..... 197 N.C. 709 104
Cotton Mills v. Mfg. Co. ..... 218 N.C. 560 651
Cover v. McAden ..... 183 N.C. 641 80
Coward v. Coward ..... 216 N.C. 506 505
Cowles v. Coffey ..... 88 N.C. 340 32
Cox v. Hinshaw ..... 226 N.C. 700 683
Cox v. Lee ..... 230 N.C. 155 ..... 109, 208, 406, 421, 496
Craig v. Lumber Co. ..... 189 N.C. 137 694
Craven, *In re* Will of ..... 169 N.C. 561 ..... 70, 259, 260
Craven v. Munger ..... 170 N.C. 424 584
Credit Corp. v. Roberts ..... 230 N.C. 654 80
Credit Corp. v. Walters ..... 230 N.C. 443 554
Cresler v. Asheville ..... 134 N.C. 311 403
Croom v. Lumber Co. ..... 182 N.C. 217 728
Croom v. Murphy ..... 179 N.C. 393 694
Cross, *In re* Will of ..... 173 N.C. 711 260
Crotts v. Thomas ..... 226 N.C. 385 155
Crouse v. Barham ..... 174 N.C. 460 220
Crowell v. Crowell ..... 180 N.C. 516 ..... 538 539
Crowell v. Crowell ..... 181 N.C. 66 ..... 538, 539
Crumpler v. Hines ..... 174 N.C. 283 195
Culbreth v. Caison ..... 220 N.C. 717 ..... 76, 78, 80, 81, 220
Culp v. Love ..... 127 N.C. 457 398
Culver v. Eggers ..... 63 N.C. 630 564

Cummings v. Hoffman....113 N.C. 267.... 24
Cummins v. Fruit Co....225 N.C. 625.... 407, 422
Cunningham v. Long....186 N.C. 526.... 155
Curlee v. Bank....187 N.C. 119.... 356
Curlee v. Power Co....205 N.C. 644.... 319, 467
Current v. Church....207 N.C. 658.... 493
Currie v. Gilchrist....147 N.C. 648.... 141
Cutler v. Cutler....130 N.C. 1.... 256
Cutter v. Trust Co....213 N.C. 686.... 295, 615

D

Dale v. R. R....132 N.C. 705.... 160
Dalrymple v. Sinkoe....230 N.C. 453.... 274
Daniels v. Distributing Co....178 N.C. 15.... 646
Daniels v. R. R....158 N.C. 418.... 526
Darden v. Matthews....173 N.C. 186.... 596
Davis v. Blomberg....185 N.C. 496.... 196
Davis v. Davis....223 N.C. 36.... 64
Davis v. R. R....200 N.C. 345.... 319
Davis v. Rhodes....231 N.C. 71.... 651
Davis v. Robinson....189 N.C. 589.... 248
Dawson v. Dawson....211 N.C. 453.... 323
Dawson v. Ennett....151 N.C. 543.... 220
Dawson v. Transportation Co....230 N.C. 36.... 407, 422
Dawson v. Wood....177 N.C. 158.... 395
Day v. Stevens.... 88 N.C. 83.... 389
Delafield v. Construction Co....118 N.C. 105.... 356
DeLaney v. Clark....196 N.C. 282.... 395
DeLaney v. Henderson-Gilmer Co. ....192 N.C. 647.... 572
Denny v. Mecklenburg County....211 N.C. 558.... 594
Dependents of Phifer v. Dairy....200 N.C. 65.... 713
Deyton, In re Will of....177 N.C. 494.... 255
Dibbrell v. Ins. Co....110 N.C. 193.... 456, 457
Dickensheets v. Taylor....223 N.C. 570.... 650
Dillingham v. Gardner....219 N.C. 227.... 31, 588
Discount Corp. v. Radecky....205 N.C. 163.... 554, 560
Distributing Co. v. Carraway....196 N.C. 58.... 372
Dobson v. Murphy.... 18 N.C. 586.... 32
Dockery v. Hamlet....162 N.C. 118.... 74, 75
Dodds v. Trust Co....205 N.C. 153.... 645
Donnell v. Greensboro....164 N.C. 330.... 587, 588
Dover v. Mfg. Co....157 N.C. 324.... 104
Drainage District v. Comrs. of Cabarrus ....174 N.C. 738.... 719
Drill Co. v. Allison.... 94 N.C. 548.... 555
Drumwright v. Theatres....228 N.C. 325.... 476, 548
Duffy v. Duffy....221 N.C. 521.... 615
Dumas v. Morrison....175 N.C. 431.... 63
Dunn v. Bomberger....213 N.C. 172.... 547
Dunn v. Currie....141 N.C. 123.... 46
Dunn v. Hines....164 N.C. 113.... 228
Dunn v. Marks....141 N.C. 232.... 364 426
Dunnevant v. R. R....167 N.C. 232.... 476
Dupree, *In re* Will of....163 N.C. 256.... 465

Dupree v. Ins. Co. ..... 93 N.C. 237 471
Dwiggins v. Bus Co. ..... 230 N.C. 234 429

E

Eames v. Armstrong ..... 136 N.C. 392 584
Earp v. Earp ..... 54 N.C. 118 129
Eddleman v. Lentz ..... 158 N.C. 65 ..... 74, 75
Edwards v. White ..... 180 N.C. 55 466
Efird, *In re* Will of ..... 195 N.C. 76 ..... 259, 260
Elder v. R. R. ..... 194 N.C. 617 421
Eledge v. Light Co. ..... 230 N.C. 584 ..... 288, 289, 737
Eley v. R. R. ..... 165 N.C. 78 579
Elks v. Ins. Co. ..... 159 N.C. 619 728
Eller v. Greensboro ..... 190 N.C. 715 570
Ellis v. Ellis ..... 198 N.C. 767 156
Ellis v. Institution ..... 68 N.C. 423 564
Elmore v. General Amusements ..... 221 N.C. 535 669
Elramy v. Abeyounis ..... 189 N.C. 278 89
Embler v. Embler ..... 224 N.C. 811 651
Emery v. Ins. Co. ..... 228 N.C. 532 407
Employment Security Com. v. Roberts ..... 230 N.C. 262 80
Ericson v. Ericson ..... 226 N.C. 474 323
Etheridge v. Cochran ..... 196 N.C. 681 538
Etheridge, *In re* Will of ..... 229 N.C. 280 ..... 255, 502
Etheridge v. Leary ..... 227 N.C. 636 118
Eubanks, *In re* ..... 202 N.C. 357 118
Everett v. Johnson ..... 219 N.C. 540 84
Ex parte Rees ..... 180 N.C. 192 222

F

Fanelty v. Jewelers ..... 230 N.C. 694 641
Farfour v. Fahad ..... 214 N.C. 281 693
Farmers Federation, Inc. v. Morris ..... 223 N.C. 467 ..... 282, 284
Fashion Co. v. Grant ..... 165 N.C. 453 398
Faust v. Faust ..... 144 N.C. 383 195
Fawley v. Bobo ..... 231 N.C. 203 ..... 421, 476, 496
Featherstone v. Cotton Mills ..... 159 N.C. 429 103
Ferguson v. Ferguson ..... 225 N.C. 375 329
Ferrell v. Hales ..... 119 N.C. 199 366
Ferrell v. Hinton ..... 161 N.C. 348 471
Ferrell v. Worthington ..... 226 N.C. 609 651
Finance Corp. v. Hodges ..... 230 N.C. 580 554
Finance Co. v. Trust Co. ..... 213 N.C. 369 33
Fish v. Hanson ..... 223 N.C. 143 579
Flemming v. Roberts ..... 84 N.C. 532 362
Flynt v. Conrad ..... 61 N.C. 190 660
Foard v. Hall ..... 111 N.C. 369 664
Fortune v. Watkins ..... 94 N.C. 304 356
Foster, *In re* ..... 209 N.C. 489 9
Foundry Co. v. Construction Co. ..... 198 N.C. 177 195
Fountain, *In re* ..... 182 N.C. 49 439
Fountain v. Pitt County ..... 171 N.C. 113 719
Fowler v. Fowler ..... 131 N.C. 169 7

Fox v. Mills....225 N.C. 580.... 580
Foy v. Hurley....172 N.C. 575.... 554
Foy v. Stephens....168 N.C. 438.... 74, 75
Francis v. Francis....223 N.C. 401.... 46, 47
Franklin v. Realty Co....202 N.C. 212.... 250
Franks, *In re* Will of....231 N.C. 252.... 736
Frederick v. Ins. Co....221 N.C. 409.... 693
Freeman v. Comrs. of Madison....217 N.C. 209.... 460, 461
Freeman v. Comrs. of Madison....221 N.C. 63.... 460
Freeman v. Thompson....216 N.C. 484.... 194, 196
Fry v. Utilities Co....183 N.C. 281.... 185
Fuller, *In re* Will of....189 N.C. 509.... 255

G

Galloway v. Carter....100 N.C. 111....220, 222, 223
Gardner v. McDonald....223 N.C. 854.... 669
Garland v. Improvement Co....184 N.C. 551.... 490
Garland v. Ins. Co....179 N.C. 67.... 730
Garsed v. Garsed....170 N.C. 672.... 130
Gas Co. v. Montgomery Ward & Co. ....231 N.C. 270.... 706
Gassaway v. Gassaway & Owen, Inc. ....220 N.C. 694.... 479
Gaster v. Thomas....188 N.C. 346.... 127
Gaylord v. Gaylord.... 57 N.C. 74.... 129
Gaylord v. Gaylord....150 N.C. 222.... 55, 64
Gaylord v. McCoy....161 N.C. 685.... 155
George v. R. R....210 N.C. 58.... 75, 319
Gibbs v. Higgsin....215 N.C. 201.... 81
Gibson v. Gibson.... 49 N.C. 425.... 221
Gilliam v. Reddick.... 26 N.C. 368.... 564
Gillikin v. Canal Co....147 N.C. 39.... 74, 75
Gilmore v. Board of Education....222 N.C. 358.... 480
Gilreath v. Gilreath.... 57 N.C. 142.... 260
Glanton v. Jacobs....117 N.C. 427.... 89
Glass Co. v. Fidelity Co....193 N.C. 769.... 195
Glover v. Glover....224 N.C. 152.... 660
Glover v. Ins. Co....228 N.C. 195.... 397
Godfrey v. Power Co....223 N.C. 647.... 197, 289
Godwin v. R. R....220 N.C. 281.... 407
Goldsboro v. Supply Co....200 N.C. 405.... 446
Goode v. Hearne....180 N.C. 475.... 220
Goodman v. Call....185 N.C. 607.... 365
Goodman v. Goodman....201 N.C. 794.... 364
Gordon v. Ehringhaus....190 N.C. 147.... 220, 679
Gordon v. Gas Co....178 N.C. 435.... 333, 719
Gorham, *In re*....129 N.C. 481.... 439
Gorham v. Ins. Co....215 N.C. 195.... 665, 736
Gorrell v. Water Supply Co....124 N.C. 328.... 195
Goswick v. Durham....211 N.C. 687.... 50
Graham v. Houston.... 15 N.C. 232.... 140
Graham v. Ins. Co....176 N.C. 313.... 646
Gray v. Warehouse Co....181 N.C. 166.... 146
Green v. Casualty Co....203 N.C. 767.... 118
Green v. Griffin.... 95 N.C. 50....426, 427 439

Green v. Kitchen....229 N.C. 450.... 443
Grier v. Phillips....230 N.C. 672.... 632
Griggs v. York-Shipley....229 N.C. 572.... 579
Grocery Co. v. Newman....184 N.C. 370.... 362
Grogan v. Ashe....156 N.C. 286.... 709
Groome v. Davis....215 N.C. 510.... 407
Groome v. Statesville....207 N.C. 538.... 476
Grubbs v. Ferguson....136 N.C. 60.... 331
Guilford County v. Georgia Co. 109 N.C. 310.... 364
Gulledge v. R. R....147 N.C. 234.... 319
Gunter v. Sanford....186 N.C. 452.... 410
Gurganious v. Simpson....213 N.C. 613.... 13
Gurley v. Power Co....172 N.C. 690.... 694

H

Hall v. Tillman....115 N.C. 500.... 69
Hallman v. Union....219 N.C. 798.... 526
Halstead v. Mullen.... 93 N.C. 252.... 74
Hampton v. Hawkins....219 N.C. 205.... 407, 421
Hampton v. Spindale....210 N.C. 546.... 158
Hampton v. West....212 N.C. 315.... 597
Hancock v. Wilson....211 N.C. 129.... 211
Hanford v. McSwain....230 N.C. 229.... 80
Hanie v. Penland....193 N.C. 800.... 319
Hardee, *In re* Will of....187 N.C. 381.... 259
Hardee v. Rivers....228 N.C. 66.... 596
Hardy v. Dahl....209 N.C. 746.... 156
Hardy v. Ins. Co....180 N.C. 180.... 456
Hardy v. Williams.... 31 N.C. 177.... 645
Harper v. Harper....148 N.C. 453.... 692
Harper v. Harper....225 N.C. 260.... 693
Harrell v. Hagan....147 N.C. 111.... 226
Harris v. Allen....104 N.C. 86.... 554
Harris v. Burwell.... 65 N.C. 584.... 647
Harris, *In re* Will of....218 N.C. 259.... 260
Harris v. R. R....190 N.C. 480.... 69
Hartman v. Flynn....189 N.C. 452.... 119
Harton v. Telephone Co....141 N.C. 455.... 275
Hartsfield v. Bryan....177 N.C. 166.... 74
Harvey v. Johnson....133 N.C. 352.... 538
Harvey v. Linker....226 N.C. 711.... 56
Hat Co. v. Chizik....223 N.C. 371.... 531
Hatch v. R. R....183 N.C. 617.... 319, 719
Hatcher v. Williams....225 N.C. 112.... 333
Havens v. Potts.... 86 N.C. 31.... 647
Hawkins v. Lumber Co....139 N.C. 160.... 661
Hawley v. Powell....222 N.C. 713.... 364
Hayes v. Creamery....195 N.C. 113.... 185
Hayes v. Elon College....224 N.C. 11.... 479
Hayes v. Telegraph Co....211 N.C. 192.... 407
Haywood v. Rigsbee....207 N.C. 684.... 121
Helms v. Collins....200 N.C. 89.... 119
Helms v. Green....105 N.C. 251.... 66
Helmstetler v. Power Co....224 N.C. 821.... 539
Hemmings v. Doss....125 N.C. 400.... 651

Henderson v. Power Co.....200 N.C. 443..... 120, 222, 226, 617
Henderson v. Wilmington.....191 N.C. 269..... 151
Henderson County v. Johnson....230 N.C. 723..... 80
Henderson-Snyder Co. v. Polk....149 N.C. 104..... 439
Henson v. Wilson.....225 N.C. 417..... 406
Herman v. R. R.....197 N.C. 718..... 276
Herndon v. Massey.....217 N.C. 610..... 156
Herring, *In re* Will of.....152 N.C. 258..... 255, 256
Herring v. Pugh.....126 N.C. 852..... 439
Heyer v. Bulluck.....210 N.C. 321.....220, 227, 328, 597, 691
Hickory v. Catawba County.....206 N.C. 165..... 579, 639
Higdon v. Jaffa.....231 N.C. 242..... 683
Higson v. Ins. Co.....152 N.C. 206..... 457
Hildebrand v. Furniture Co.....212 N.C. 100..... 713
Hildebrand v. Telegraph Co.....216 N.C. 235..... 156
Hill v. Colie.....214 N.C. 408..... 710
Hill v. Lopez.....228 N.C. 433..... 407
Hill v. Ponder.....221 N.C. 58..... 460
Hill v. R. R.....229 N.C. 236..... 500
Hill v. Stansbury.....221 N.C. 339.....104 156, 598
Hilliard v. Kearney..... 45 N.C. 221..... 221, 223
Hinnant v. R. R.....202 N.C. 489..... 275, 276
Hinson v. Davis.....220 N.C. 380..... 288
Hinton v. Hicks.....156 N.C. 24..... 214
Hinton v. Ins. Co.....116 N.C. 22..... 490
Hipp v. Farrell.....169 N.C. 551..... 289
Hitch v. Comrs.....132 N.C. 573..... 74
Hobbs v. Coach Co.....225 N.C. 323..... 380
Hobbs v. Drewer.....226 N.C. 146..... 407, 422
Hogsed v. Pearlman.....213 N.C. 240..... 333, 719
Hoke v. Glenn.....167 N.C. 594..... 74
Hoke v. Greyhound Corp.....227 N.C. 374..... 365
Holland v. Smith.....224 N.C. 255..... 227, 597, 679, 691
Holland v. Strader.....216 N.C. 436..... 535, 706
Hollingsworth v. Grier.....231 N.C. 108..... 208, 496
Holly v. Holly..... 94 N.C. 670..... 390
Holmes v. Wharton.....194 N.C. 470..... 486
Holton v. Mocksville.....189 N.C. 144..... 134
Homes Co. v. Falls.....184 N.C. 426..... 247, 248
Hood v. Mitchell.....206 N.C. 156..... 291
Horah v. Knox..... 87 N.C. 483..... 71
Hornaday v. Hornaday.....229 N.C. 164..... 119
Hornthal v. Burwell.....109 N.C. 10..... 554
Horton v. Horton.....186 N.C. 332..... 130
Horton v. Ins. Co.....122 N.C. 498..... 456
Hosiery Mill v. Hosiery Mills.....198 N.C. 596..... 362
Hospital v. Cone.....231 N.C. 292..... 615
Hough v. R. R.....144 N.C. 692..... 289
House v. Parker.....181 N.C. 40..... 69
Howard v. Coach Co.....216 N.C. 799..... 603, 669
Howard v. Howard.....200 N.C. 574..... 693
Howard v. Telegraph Co.....170 N.C. 495..... 58
Howerton v. Sexton.....104 N.C. 75..... 486
Hoyle v. Stowe..... 13 N.C. 318..... 691
Hughes v. Hodges..... 94 N.C. 56..... 487

Hughes v. Long....119 N.C. 52.... 564
Hughes v. Oliver....228 N.C. 680.... 333
Hughes v. Thayer....229 N.C. 773.... 250, 683
Humphrey v. Beall....215 N.C. 15.... 249
Humphrey v. Lumber Co....174 N.C. 514.... 214
Humphries v. Coach Co....228 N.C. 399.... 210
Humphries v. Edwards....164 N.C. 154.... 633
Hunt v. Meyers Co....201 N.C. 636.... 548
Hunt v. State....201 N.C. 707.... 712, 713
Hutchins v. Taylor-Buick Co....198 N.C. 777.... 98

I

Ikerd v. R. R....209 N.C. 270.... 288
In re Abee....146 N.C. 273.... 260
In re Coston....187 N.C. 509.... 93
In re Estate of Wallace....197 N.C. 334.... 8
In re Eubanks....202 N.C. 357.... 118
In re Foster....209 N.C. 489.... 9
In re Fountain....182 N.C. 49.... 439
In re Gorham....129 N.C. 481.... 439
In re Jones....153 N.C. 312.... 93
In re McGraw....228 N.C. 46.... 9
In re McKay....183 N.C. 226.... 665
In re Parker....177 N.C. 463.... 439
In re Parker....209 N.C. 693.... 446
In re Pitchi....231 N.C. 485.... 542
In re Russell.... 60 N.C. 388.... 565
In re Sale of Land of Sharpe....230 N.C. 412.... 527
In re Shelton....203 N.C. 75....9, 94, 95
In re Steelman....219 N.C. 306.... 384, 385
In re Stiers....204 N.C. 48.... 365
In re Taylor....229 N.C. 297.... 25, 341
In re Taylor....230 N.C. 566.... 25, 341
In re Tenhoopen....202 N.C. 223.... 93
In re Wallace....212 N.C. 490.... 647
In re Westover Canal....230 N.C. 91.... 133
In re Young....137 N.C. 552.... 439
In re Will of Baldwin....146 N.C. 25.... 256
In re Will of Bowling....150 N.C. 507.... 255
In re Will of Broach....172 N.C. 520....71, 255, 259
In re Will of Brown....194 N.C. 583.... 71
In re Will of Burns....121 N.C. 336.... 70
In re Will of Cherry....164 N.C. 363.... 70
In re Will of Chisman....175 N.C. 420.... 503
In re Will of Cooper....223 N.C. 34.... 259
In re Will of Craven....169 N.C. 561....70, 259, 260
In re Will of Cross....173 N.C. 711.... 260
In re Will of Deyton....177 N.C. 494.... 255
In re Will of Dupree....163 N.C. 256.... 465
In re Will of Efird....195 N.C. 76.... 259, 260
In re Will of Etheridge....229 N.C. 280.... 255, 502
In re Will of Fuller....189 N.C. 509.... 255
In re Will of Franks....231 N.C. 252.... 736
In re Will of Hardee....187 N.C. 381.... 259
In re Will of Harris....218 N.C. 459.... 260

Lide v. Wells....190 N.C. 37....113, 121
Light Co. v. Bowman....229 N.C. 682....332, 333
Light Co. v. Iseley....203 N.C. 811....118
Light Co. v. Moss....220 N.C. 200....8, 58
Likas v. Lackey....186 N.C. 398....363
Lincoln v. R. R....207 N.C. 787....407
Lindsey v. Knights of Honor....172 N.C. 818....365
Lineberger v. Gastonia....196 N.C. 445....158, 541
Lister v. Lister....222 N.C. 555....266
Lithograph Corp. v. Clark....214 N.C. 400....683
Livingston v. Investment Co....219 N.C. 416....74
Lloyd v. R. R....166 N.C. 24....160
Loan Asso. v. Merritt....112 N.C. 243....647
Locklear v. Savage....159 N.C. 236....139
Lockman v. Lockman....220 N.C. 95....530
Lodge v. Gibbs....159 N.C. 66....438
Loftin v. Kornegay....225 N.C. 490....64
Lomax, *In re* Will of....224 N.C. 459....70, 71
Lomax, *In re* Will of....225 N.C. 592....70
Long v. Jarratt....94 N.C. 443....322, 323
Long v. Love....230 N.C. 535....734
Love v. Johnston....34 N.C. 355....257
Lowman v. Comrs. of Lovelady 191 N.C. 147....641
Lumber Co. v. Herrington....183 N.C. 85....394, 395
Lumber Co. v. Pemberton....188 N.C. 532....336
Lumber Co. v. Smith....146 N.C. 199....411
Lumber Co. v. Wilson....222 N.C. 87....323
Lupton v. Day....211 N.C. 443....66
Lupton v. Edmundson....220 N.C. 188....32
Luttrell v. Hardin....193 N.C. 266....103
Lyon v. *Comrs. of* Granville....120 N.C. 238....639

Mc

McCallum v. McCallum....167 N.C. 310....690
McCoy v. Beard....9 N.C. 377....31
McCoy v. R. R....229 N.C. 57....319
McCrowell v. R. R....221 N.C. 366....407
McCullen v. Durham....229 N.C. 418....32
McDaniel v. Leggett....224 N.C. 806....90, 579, 580
McDonald, *In re* Will of....219 N.C. 209....256
McGill v. Lumberton....215 N.C. 752....479
McGraw, *In re*....228 N.C. 46....9
McGuire v. Lumber Co....190 N.C. 806....319, 320
McIntyre v. Elevator Co....230 N.C. 539....275, 706
McIver v. McKinney....184 N.C. 393....328, 329
McKay, *In re*....183 N.C. 226....665
McKinnie v. Rutherford....21 N.C. 14....647
McLaurin v. McLaurin....106 N.C. 331....362
McLean v. Caldwell....178 N.C. 424....395
McLeskey v. Heinlein....200 N.C. 290....248, 252
McMahan v. R. R....170 N.C. 456....570
McManus v. R. R....150 N.C. 655....50
McNeill v. R. R....117 N.C. 642....24

M

Mack v. Marshall Field & Co.....217 N.C. 55..... 288
Mfg. Co. v. Arnold.....228 N.C. 375..... 439, 580
Mfg. Co. v. Brooks.....106 N.C. 107..... 579
Mfg. Co. v. Jefferson.....216 N.C. 230..... 588
Markham v. Simpson.....175 N.C. 135..... 565
Markland v. Crump..... 18 N.C. 94..... 81
Marsh v. Dellinger.....127 N.C. 360..... 123
Marsh v. R. R.....151 N.C. 160..... 196
Marshall v. Dicks.....175 N.C. 38..... 398
Martin v. Flippin.....101 N.C. 452..... 362
Martin v. Richardson..... 68 N.C. 255..... 647
Mason v. Comrs. of Moore.....229 N.C. 626..... 591
Mason v. Johnston.....215 N.C. 95..... 535
Mason v. White..... 53 N.C. 421..... 121
Massengill v. Abell.....192 N.C. 240..... 121
Massey v. Massey.....208 N.C. 818..... 129
Mathis v. Mfg. Co.....204 N.C. 434..... 319
Matthews v. Fry.....143 N.C. 384..... 579
May v. Lewis.....132 N.C. 115..... 328
Medlin v. Medlin.....175 N.C. 529..... 130
Mercer v. Downs.....191 N.C. 203..... 227
Midgett v. Gray.....158 N.C. 133..... 664
Miller v. Greenwood.....218 N.C. 146..... 471
Miller v. Groome.....109 N.C. 148..... 63
Milling Co. v. Highway Com.....190 N.C. 692..... 705
Mills v. Mills.....195 N.C. 595..... 503
Mills v. Mills.....230 N.C. 286..... 284
Mion v. Marble & Tile Co.....217 N.C. 743..... 713
Mitchell v. Ahoskie.....190 N.C. 235..... 570
Mitchell v. Bridgers.....113 N.C. 63..... 140
Mobley v. Griffin.....104 N.C. 112..... 141
Modlin v. Ins. Co.....151 N.C. 35..... 456
Moffit v. Witherspoon..... 32 N.C. 185..... 658
Monger v. Lutterloh.....195 N.C. 274..... 14
Monroe v. Niven.....221 N.C. 362..... 301, 487
Moody v. Howell.....229 N.C. 198..... 90
Moody v. Sitton..... 37 N.C. 382..... 647
Mooney v. Mull.....216 N.C. 410..... 632
Moore v. Boone.....231 N.C. 494..... 476
Moore v. Casualty Co.....207 N.C. 433..... 602
Moore v. Harkins.....179 N.C. 167..... 372
Moore v. Hinnant..... 87 N.C. 505..... 362
Moore v. Moore.....130 N.C. 333..... 130
Moore v. Moore.....185 N.C. 332..... 601
Moore v. Moore.....224 N.C. 552..... 323
Moore v. Rankin.....172 N.C. 599..... 83
Morehead v. Montague.....200 N.C. 497..... 328
Morgan v. Stewart.....144 N.C. 424..... 633
Moring v. Dickerson..... 85 N.C. 466..... 214
Morris v. Kramer.....182 N.C. 87..... 470, 667
Morris v. Osborne.....104 N.C. 609..... 658
Morris v. Tate.....230 N.C. 29..... 732
Morrow v. Cline.....211 N.C. 254..... 13
Morrow v. Mills.....181 N.C. 423..... 570

Morrow v. R. R.....213 N.C. 127..... 13
Morse v. Walker.....229 N.C. 778..... 693
Moseley v. Knott.....212 N.C. 651..... 121
Moses v. Morganton.....192 N.C. 102..... 158
Mosteller v. Bost..... 42 N.C. 39..... 647
Mulford v. Hotel Co.....213 N.C. 603..... 476
Murphy v. Coach Co.....200 N.C. 92..... 535
Murray v. Blackledge..... 71 N.C. 492..... 526
Murray v. R. R.....218 N.C. 392.....378, 380, 501
Muse v. Assurance Co.....108 N.C. 240..... 456
Myatt v. Myatt.....149 N.C. 137..... 257, 260

N

Nannie v. Pollard.....205 N.C. 362..... 351
Nash v. Monroe.....198 N.C. 306..... 616
Neely v. Minus.....196 N.C. 345..... 319
Nelson v. Relief Department.....147 N.C. 103..... 526, 527
Nesbitt v. Donoho.....198 N.C. 147..... 46
Newbern v. Leary.....215 N.C. 134..... 535, 683
Newman v. Bost.....122 N.C. 524..... 351
Nichols v. Goldston.....228 N.C. 514..... 423
Nichols v. Trust Co.....231 N.C. 158..... 367
Nobles v. Nobles.....177 N.C. 243..... 328
Nobles v. Roberson.....212 N.C. 334..... 439
Nooe v. Vannoy..... 59 N.C. 185..... 709
Norfleet v. Staton..... 73 N.C. 546..... 563, 564

O

Observer Co. v. Little.....175 N.C. 42..... 69
Odom v. Palmer.....209 N.C. 93..... 579
Oettinger v. Stock Co.....170 N.C. 152..... 584
Osborne v. Canton.....219 N.C. 139..... 333
Overman v. Lanier.....156 N.C. 537..... 63
Owens v. Chaplin.....228 N.C. 705..... 559
Ownbey v. Parkway Properties 222 N.C. 54..... 139

P

Pafford v. Construction Co.....217 N.C. 730..... 548
Page v. McDonald.....159 N.C. 38..... 83
Page v. Page.....167 N.C. 346..... 128
Paine v. Roberts..... 82 N.C. 451..... 658
Palmer v. Haywood County.....212 N.C. 284..... 616
Parker v. Duke University.....230 N.C. 656..... 80, 104, 156, 333, 344, 598
Parker, *In re*.....177 N.C. 463..... 439
Parker, *In re*.....209 N.C. 693..... 446
Parker v. Mott.....181 N.C. 435..... 351
Parlier v. Drum.....231 N.C. 155..... 334
Parlier v. Miller.....186 N.C. 501..... 195
Parrish v. Hewitt.....220 N.C. 708..... 517
Parrish v. R. R.....221 N.C. 292..... 362
Pascal v. Transit Co.....229 N.C. 435..... 272
Patterson v. McCormick.....177 N.C. 448.....220, 221, 226
Patterson v. Patterson.....230 N.C. 481..... 127
Paul v. Paul.....199 N.C. 522..... 328, 329

Paul v. Willoughby....204 N.C. 595.... 617
Peele v. Powell....156 N.C. 553.... 282
Peele v. Powell....161 N.C. 50.... 282
Pemberton v. Greensboro....205 N.C. 599.... 156, 598
Pence v. Price....211 N.C. 707.... 30
Pendleton v. Williams....175 N.C. 248.... 395
Penick v. Bank....218 N.C. 686.... 296, 615
Penn v. Coastal Corp....231 N.C. 481.... 650
Penny v. Stone....228 N.C. 295.... 598
Perrett v. Bird....152 N.C. 220.... 220, 226
Perry v. Hurdle....229 N.C. 216.... 632
Perry v. Perry....175 N.C. 141.... 709
Perry v. Trust Co....226 N.C. 667.... 732
Person v. Watts....184 N.C. 499.... 411
Peterson v. McManus....208 N.C. 802.... 288
Pharr v. Pharr....223 N.C. 115.... 333
Phelps v. Davenport....151 N.C. 22.... 155
Phifer, Dependents of, v. Dairy 200 N.C. 65.... 713
Phillips v. Land Co....176 N.C. 514.... 284
Phillips v. Nessmith....226 N.C. 173....407, 683, 686
Phillips v. Phillips....223 N.C. 276.... 601
Phipps v. Vannoy....229 N.C. 629.... 93, 323
Phosphate Co. v. Johnson....188 N.C. 419.... 397
Piano Co. v. Kennedy....152 N.C. 196.... 69
Pilley v. Smith....230 N.C. 62.... 545
Pilley v. Sullivan....182 N.C. 493.... 679
Pitchi, *In re*....231 N.C. 485.... 542
Plemmons v. Cutshall....230 N.C. 595.... 90
Plemmons v. Improvement Co....108 N.C. 614.... 719
Plemmons v. R. R....140 N.C. 286.... 487
Poindexter v. McCannon.... 16 N.C. 373.... 553, 559
Poole v. Board of Examiners....221 N.C. 199.... 639
Poole v. Gentry....229 N.C. 266.... 579
Poole v. Thompson....183 N.C. 588.... 395
Poore v. Poore....201 N.C. 791.... 117
Pope, *In re* Will of....139 N.C. 484.... 256
Porter v. Durham.... 74 N.C. 767.... 569
Porter v. R. R.... 97 N.C. 46.... 195
Porter v. R. R....148 N.C. 563.... 570
Poston v. Bowen....228 N.C. 202.... 64
Potato Co. v. Jeanette....174 N.C. 236.... 705
Potter v. Clark....229 N.C. 350.... 47
Potter v. Supply Co....230 N.C. 1.... 632, 638
Power Co. v. Clay County....213 N.C. 698.... 151
Power Co. v. Elizabeth City....188 N.C. 278.... 74
Power Co. v. Klutz....196 N.C. 358.... 584
Power Co. v. Power Co....175 N.C. 668.... 89
Powers v. Sternberg....213 N.C. 41....276, 406, 407
Presnell v. Beshears....227 N.C. 279.... 75, 651
Price v. Goodman....226 N.C. 223.... 14
Pringle v. Loan Assn....182 N.C. 316.... 32
Pritchett v. Supply Co....153 N.C. 344.... 336
Privette v. Allen....227 N.C. 164.... 324
Privette v. Privette....230 N.C. 52.... 333, 334
Propst v. Trucking Co....223 N.C. 490.... 719

Pruett v. Power Co.....167 N.C. 598..... 363
Pruitt v. Bethell.....174 N.C. 454..... 50

Q

Queen v. DeHart.....209 N.C. 414..... 626

R

Rader v. Coach Co.....225 N.C. 537.....384, 579, 714
Ragan v. Ragan.....214 N.C. 36..... 363
R. R. v. Comrs. of Alamance..... 77 N.C. 4..... 411
R. R. v. Main.....132 N.C. 445..... 74
Raleigh v. Hatcher.....220 N.C. 613..... 322
Raleigh v. Public School System 223 N.C. 316..... 639
Ramsey v. Furniture Co.....209 N.C. 165..... 109
Rawlings, *In re* Will of.....170 N.C. 58..... 71
Rawls v. Bennett.....221 N.C. 127..... 633
Ray v. Ray.....219 N.C. 217..... 53
Ray v. Robinson.....216 N.C. 430..... 47
Reaves v. Power Co.....206 N.C. 523..... 104
Rector v. Lyda.....180 N.C. 577..... 195
Rector v. Rector.....186 N.C. 618..... 356
Redd v. Cotton Mills.....136 N.C. 342..... 50
Redding, *In re* Will of.....216 N.C. 497..... 259
Redwine v. Clodfelter.....226 N.C. 366..... 296, 615
Reed v. Blair.....202 N.C. 745..... 8
Reed v. Madison County.....213 N.C. 145..... 460
Reed v. Mortgage Co.....207 N.C. 27..... 323
Rees, *Ex parte*.....180 N.C. 192..... 222
Rees v. Williams.....165 N.C. 201.....220, 222, 225, 226, 228
Reeves v. Staley.....220 N.C. 573..... 378, 379, 380, 407
Reid v. Coach Co.....215 N.C. 469..... 683
Revis v. Murphy.....172 N.C. 579..... 329
Rewis v. Ins. Co.....226 N.C. 325..... 712
Rhodes v. Collins.....198 N.C. 23..... 636
Ricaud v. Alderman.....132 N.C. 62..... 647
Rice v. Saterwhite..... 21 N.C. 69..... 221
Richardson v. Cheek.....212 N.C. 510..... 597
Richardson v. Express Co.....151 N.C. 60..... 336
Riddick v. Davis.....220 N.C. 120..... 299
Ridenhour v. Ridenhour.....225 N.C. 508..... 363
Ridley v. R. R.....118 N.C. 996..... 570
Rierson v. York.....227 N.C. 575..... 84
Riggs v. Oil Co.....228 N.C. 774..... 109
Ritchie v. Ritchie.....192 N.C. 538..... 584
Ritchie v. White.....225 N.C. 450..... 175, 180
Roanoke Rapids v. Patterson.....184 N.C. 135..... 559
Robbins v. Robbins.....229 N.C. 430..... 323
Roberts v. Ins. Co.....118 N.C. 429..... 579
Roberts v. Partridge.....118 N.C. 355..... 24
Roberts v. Roberts.....185 N.C. 566..... 538, 539
Roberts v. Saunders.....192 N.C. 191..... 690
Robinson v. Daughtry.....171 N.C. 200..... 526
Robinson v. Robinson.....227 N.C. 155..... 691
Rodwell v. Coach Co.....205 N.C. 292..... 693

Ross v. Christman..... 23 N.C. 209..... 259
Roughton v. Brown..... 53 N.C. 393..... 25
Rowe v. Lumber Co.....133 N.C. 433..... 268, 269
Rowe v. Lumber Co.....138 N.C. 465..... 268
Rowland, *In re* Will of.....202 N.C. 373..... 503
Rowland v. Thompson..... 73 N.C. 504..... 123
Royster v. Wright.....118 N.C. 152..... 357
Rue v. Connell.....148 N.C. 302..... 709, 710
Ruffin v. Overby..... 88 N.C. 369..... 141
Russ v. Telegraph Co.....222 N.C. 504..... 15
Russell v. Cutshall.....223 N.C. 353..... 104, 185
Russell v. Edney.....227 N.C. 203..... 83
Russell, *In re*..... 60 N.C. 388..... 565
Russos v. Bailey.....228 N.C. 783..... 324, 384

S

Sams v. Comrs. of Madison.....217 N.C. 284.....459, 460, 462
Sanders v. May.....173 N.C. 47..... 362
Sandlin v. Yancey.....224 N.C. 519..... 651
Saunders v. Gilbert.....156 N.C. 463..... 439
Sayles v. Loftin.....217 N.C. 674..... 288
Schaeffer v. Haseltine.....228 N.C. 484..... 227
Schofield v. Bacon.....191 N.C. 253..... 195
Scholtens v. Scholtens.....230 N.C. 149..... 174, 539
School Comrs. v. Aldermen.....158 N.C. 191..... 663
Scott v. Bryan.....210 N.C. 478..... 103, 156
Sears, Roebuck & Co. v. Banking Co. .....191 N.C. 500..... 58, 66
Seawell v. Cole.....194 N.C. 546..... 641
Seawell v. Hall.....185 N.C. 80..... 545
Seawell v. R. R.....132 N.C. 856..... 667
Sharpe, *In re* Sale of Land of....230 N.C. 412..... 527
Shaw v. Barnard.....229 N.C. 713..... 103
Sheets v. Dillon.....221 N.C. 426..... 248
Sheets v. Walsh.....217 N.C. 32..... 660
Shell v. Roseman.....155 N.C. 90..... 407
Shelton, *In re*.....203 N.C. 75.....9, 94, 95
Shephard v. Leonard.....223 N.C. 110..... 94
Shirley v. Ayers.....201 N.C. 51.....211, 380, 538
Shoe Co. v. Department Store....212 N.C. 75..... 398
Shore v. Shore.....220 N.C. 802..... 323
Sides v. Tidwell.....216 N.C. 480..... 728
Silver v. Silver.....220 N.C. 191..... 323
Simmons v. Allison.....118 N.C. 763..... 526
Simmons v. Lee.....230 N.C. 216..... 80
Simmons v. McCullin.....163 N.C. 409..... 30
Simons v. Lebrun.....219 N.C. 42..... 106
Sims v. Lindsay.....122 N.C. 678..... 421
Simpson v. Hiatt..... 35 N.C. 470..... 31
Simpson v. Justice..... 43 N.C. 115..... 50
Skinner v. Terry.....107 N.C. 103..... 84
Skittletharpe v. Skittletharpe....130 N.C. 72..... 323
Sloan v. Stanly..... 33 N.C. 627..... 31
Sloan Bros. v. Sawyer-Felder Co. .....175 N.C. 657..... 554

Small v. Morrison....185 N.C. 577....174, 180
Smith v. Carolina Beach ....206 N.C. 834....461
Smith v. Coach Co. ....214 N.C. 314....535
Smith v. Creech ....186 N.C. 187....228
Smith v. Davis ....228 N.C. 172....384, 580
Smith v. Deaver .... 49 N.C. 513....633
Smith v. Furniture Co. ....221 N.C. 536....669
Smith v. Gastonia ....216 N.C. 517....712
Smith v. Ins. Co. ....208 N.C. 99....363
Smith v. Kappas ....218 N.C. 758....197
Smith v. Lumber Co. ....144 N.C. 47....89
Smith v. Mears ....218 N.C. 193....220, 227, 328, 596, 597
Smith v. Sink ....211 N.C. 725....276
Smith v. Whitley ....223 N.C. 534....186, 189, 190
Smoak v. Sockwell....152 N.C. 503....554
Snow v. Boylston....185 N.C. 321....690
Sparks v. Products Corp....212 N.C. 211....15
Sparks v. Sparks.... 69 N.C. 319....129
Spence v. Tapscott.... 93 N.C. 246....647
Spencer v. Brown....214 N.C. 114....58
Sprinkle v. Wellborn....140 N.C. 163....658
Springs v. Cole....171 N.C. 418....195
Springs v. Hopkins....171 N.C. 486....545
Springs v. Scott....132 N.C. 548....395
Spruill v. Bank....163 N.C. 43....364
Stadiem v. Harvell....208 N.C. 103....587, 588
Stallings v. Ins. Co....229 N.C. 529....733
Stallings v. Ins. Co....230 N.C. 304....733
Stancill v. Branch.... 61 N.C. 306....31
Stanley v. Lumber Co....184 N.C. 302....103
Starbuck v. Starbuck.... 93 N.C. 183....709
Starkey v. Gardner....194 N.C. 74....668
S. v. Alderman ....182 N.C. 917....43
S. v. Allen ....197 N.C. 684....167
S. v. Alston ....215 N.C. 713....153, 306
S. v. Anderson ....222 N.C. 148....68, 654
S. v. Anderson ....228 N.C. 720....305
S. v. Arrington .... 7 N.C. 571....626
S. v. Arrowood ....187 N.C. 715....167
S. v. Auston ....223 N.C. 203....667
S. v. Bagley ....158 N.C. 608....700
S. v. Baker ....222 N.C. 428....339
S. v. Baldwin ....193 N.C. 566....470
S. v. Baldwin ....226 N.C. 295....402
S. v. Ballangee ....191 N.C. 700....420
S. v. Banks ....143 N.C. 652....304
S. v. Barnhardt ....230 N.C. 223....60
S. v. Batson ....220 N.C. 411....415
S. v. Battle ....198 N.C. 379....212
S. v. Bazemore ....193 N.C. 336....626
S. v. Beal ....199 N.C. 278....53, 413, 439
S. v. Bean ....211 N.C. 59....470
S. v. Belk .... 76 N.C. 10....326
S. v. Bell ....205 N.C. 225....305, 521
S. v. Bell ....228 N.C. 659....591

S. v. Bennett ....226 N.C. 82.... 312
S. v. Benson ....183 N.C. 795.... 311, 339
S. v. Bentley ....223 N.C. 563.... 626
S. v. Biggs ....224 N.C. 722....153, 305, 415
S. v. Bishop ....131 N.C. 733.... 304
S. v. Blackwell ....162 N.C. 672.... 591
S. v. Bohanon ....142 N.C. 695.... 628
S. v. Boon .... 1 N.C. 191.... 304
S. v. Bost ....192 N.C. 1.... 654
S. v. Boswell ....194 N.C. 260.... 167
S. v. Bowman .... 80 N.C. 432.... 699
S. v. Bowman ....230 N.C. 203.... 52, 54
S. v. Bowser ....230 N.C. 330.... 326
S. v. Boyce ....109 N.C. 739.... 139
S. v. Braxton ....230 N.C. 312.... 107, 108
S. v. Bright ....215 N.C. 537.... 700
S. v. Brooks ....225 N.C. 662.... 153
S. v. Brown ....225 N.C. 22....242, 326, 636
S. v. Browning .... 78 N.C. 555.... 471
S. v. Bryant ....189 N.C. 112.... 470, 667
S. v. Bryant ....231 N.C. 106.... 339
S. v. Bryson .... 81 N.C. 595.... 141
S. v. Bryson ....200 N.C. 50.... 68, 654
S. v. Buchanan ....216 N.C. 34.... 667
S. v. Burney ....215 N.C. 598.... 68
S. v. Burton .... 94 N.C. 947.... 699
S. v. Bynum ....175 N.C. 777.... 43
S. v. Caldwell ....212 N.C. 484.... 628
S. v. Calloway ....119 N.C. 864.... 140
S. v. Camby ....209 N.C. 50.... 166, 241
S. v. Campbell ....133 N.C. 640.... 139
S. v. Cantrell ....230 N.C. 46.... 470, 667
S. v. Carmon ....145 N.C. 481.... 42
S. v. Carver ....213 N.C. 150.... 167
S. v. Casey ....159 N.C. 474.... 591
S. v. Cloninger ....149 N.C. 567.... 665
S. v. Cockrell ....230 N.C. 110.... 591
S. v. Coffey ....210 N.C. 561.... 43
S. v. Coffey ....228 N.C. 119.... 339
S. v. Cole ....132 N.C. 1069.... 304
S. v. Cole ....202 N.C. 592.... 420
S. v. Collins ....115 N.C. 716.... 520
S. v. Cope ....204 N.C. 28.... 215, 507
S. v. Correll ....228 N.C. 28.... 414
S. v. Correll ....229 N.C. 640.... 592
S. v. Costner ....127 N.C. 566.... 42
S. v. Covington ....117 N.C. 834.... 153, 306
S. v. Cox ....201 N.C. 357.... 591
S. v. Crandall ....225 N.C. 148.... 8
S. v. Crawford ....197 N.C. 513.... 166
S. v. Crawley ....103 N.C. 353.... 141
S. v. Creech ....229 N.C. 662.... 213
S. v. Cross ....101 N.C. 770.... 520
S. v. Crossett .... 81 N.C. 579.... 141
S. v. Crump ....209 N.C. 52.... 166

S. v. Dalton ....178 N.C. 779....68, 304, 305
S. v. Daniel ....136 N.C. 571....317, 509
S. v. Daniels ....231 N.C. 17....341, 510
S. v. Daniels ....231 N.C. 341....510
S. v. Davenport ....156 N.C. 596....139
S. v. Davenport ....227 N.C. 475....42
S. v. Davis ....177 N.C. 573....439
S. v. Davis ....209 N.C. 242....600
S. v. Davis ....214 N.C. 787....455
S. v. Dee ....214 N.C. 509....665, 736
S. v. DeGraffenreid ....223 N.C. 461....339
S. v. Dewey ....139 N.C. 556....364, 366, 426
S. v. Dick ....60 N.C. 440....667
S. v. Dixon ....75 N.C. 275....165, 170
S. v. Dixon ....215 N.C. 438....627
S. v. Donnell ....202 N.C. 782....153, 306
S. v. Dove ....222 N.C. 162....53
S. v. Durham ....121 N.C. 546....140
S. v. Durham ....201 N.C. 724....216
S. v. Edwards ....190 N.C. 322....446
S. v. Edwards ....211 N.C. 555....339
S. v. Edwards ....224 N.C. 527....107, 415
S. v. Ellen ....68 N.C. 281....141
S. v. Ellis ....203 N.C. 836....165
S. v. Ellis ....210 N.C. 166....167, 446
S. v. Ellis ....210 N.C. 170....166
S. v. Ellison ....230 N.C. 59....667
S. v. Ensley ....228 N.C. 271....700
S. v. Epps ....213 N.C. 709....470
S. v. Evans ....198 N.C. 82....311
S. v. Ewing ....227 N.C. 535....213
S. v. Exum ....213 N.C. 16....153, 306
S. v. Faggart ....170 N.C. 737....140
S. v. Fairley ....227 N.C. 134....414
S. v. Fender ....125 N.C. 649....139
S. v. Fentress ....230 N.C. 248....470
S. v. Ferrell ....202 N.C. 475....665
S. v. Fisher ....109 N.C. 817....140
S. v. Flinchem ....228 N.C. 149....61
S. v. Flowers ....6 N.C. 225....139
S. v. Forshee ....228 N.C. 268....44, 626
S. v. Forte ....222 N.C. 537....141
S. v. Foster ....130 N.C. 666....165
S. v. Fowler ....151 N.C. 731....591
S. v. Fowler ....230 N.C. 470....107
S. v. Friddle ....223 N.C. 258....58
S. v. Fulcher ....184 N.C. 663....339
S. v. Fulkerson ....61 N.C. 233....68
S. v. Gardner ....228 N.C. 567....312, 439
S. v. Gentry ....228 N.C. 643....42, 699
S. v. Gibbs ....227 N.C. 677....735
S. v. Gibson ....226 N.C. 194....626
S. v. Gibson ....229 N.C. 497....159
S. v. Glenn ....118 N.C. 1194....140
S. v. Glenn ....198 N.C. 79....339, 654

S. v. Glover ..... 208 N.C. 68 306
S. v. Godwin ..... 216 N.C. 49 415
S. v. Godwin ..... 227 N.C. 449 213
S. v. Goldston ..... 201 N.C. 89 510
S. v. Goodson ..... 107 N.C. 798 212
S. v. Gordon ..... 224 N.C. 304 60
S. v. Gordon ..... 225 N.C. 757 42
S. v. Gosnell ..... 208 N.C. 401 43
S. v. Graham ..... 224 N.C. 347 60
S. v. Grant ..... 228 N.C. 522 ..... 653, 654
S. v. Grass ..... 223 N.C. 31 ..... 153, 165, 628
S. v. Graves ..... 74 N.C. 396 141
S. v. Green ..... 207 N.C. 369 306
S. v. Gregory ..... 223 N.C. 415 44
S. v. Grier ..... 203 N.C. 586 627
S. v. Grier ..... 209 N.C. 298 ..... 165, 172
S. v. Guthrie ..... 145 N.C. 492 53
S. v. Hall ..... 108 N.C. 776 517
S. v. Hamlet ..... 206 N.C. 568 510
S. v. Hammond ..... 229 N.C. 108 153
S. v. Hampton ..... 210 N.C. 283 591
S. v. Hanks ..... 66 N.C. 612 141
S. v. Harden ..... 177 N.C. 580 563
S. v. Harman ..... 78 N.C. 515 654
S. v. Harris ..... 27 N.C. 287 446
S. v. Harris ..... 63 N.C. 1 471
S. v. Harris ..... 223 N.C. 697 ..... 165, 213, 339, 415
S. v. Harrison ..... 115 N.C. 706 628
S. v. Hart ..... 186 N.C. 582 470
S. v. Harvey ..... 214 N.C. 9 470
S. v. Harvey ..... 228 N.C. 62 213
S. v. Hause ..... 71 N.C. 518 141
S. v. Hawkins ..... 214 N.C. 326 ..... 311, 699
S. v. Herring ..... 201 N.C. 543 414
S. v. Hice ..... 117 N.C. 782 665
S. v. High ..... 215 N.C. 244 626
S. v. Hill ..... 141 N.C. 769 ..... 165, 170
S. v. Hill ..... 209 N.C. 53 166
S. v. Holbrook ..... 228 N.C. 582 470
S. v. Holland ..... 216 N.C. 610 439
S. v. Hollingsworth ..... 191 N.C. 595 168
S. v. Holt ..... 90 N.C. 749 167
S. v. Holt ..... 195 N.C. 240 242
S. v. Hough ..... 227 N.C. 596 507
S. v. Hovis ..... 76 N.C. 117 139
S. v. Howell ..... 107 N.C. 835 139
S. v. Howell ..... 218 N.C. 280 165
S. v. Howley ..... 220 N.C. 113 327
S. v. Hyman ..... 164 N.C. 411 241
S. v. Jackson ..... 150 N.C. 831 699
S. v. Jackson ..... 199 N.C. 321 626
S. v. Jackson ..... 218 N.C. 373 ..... 141, 420
S. v. Jackson ..... 226 N.C. 66 44
S. v. Jackson ..... 228 N.C. 656 58
S. v. Johnson ..... 23 N.C. 354 304

S. v. Johnson ..... 205 N.C. 610 510
S. v. Johnson ..... 226 N.C. 671 44
S. v. Johnson ..... 229 N.C. 701 455
S. v. Jones ..... 181 N.C. 546 ..... 470, 471
S. v. Jones ..... 222 N.C. 37 626
S. v. Jones ..... 227 N.C. 402 591
S. v. Jordan ..... 216 N.C. 356 700
S. v. Keith ..... 126 N.C. 1114 389
S. v. Keller ..... 214 N.C. 447 591
S. v. Kelly ..... 216 N.C. 627 ..... 43, 306
S. v. Kelly ..... 227 N.C. 62 600
S. v. King ..... 225 N.C. 236 588
S. v. King ..... 226 N.C. 241 ..... 305, 311, 699
S. v. Knotts ..... 168 N.C. 173 43
S. v. Koritz ..... 227 N.C. 552 550
S. v. Koutro ..... 210 N.C. 144 339
S. v. Lamb ..... 198 N.C. 423 517
S. v. Lampkin ..... 227 N.C. 620 24
S. v. Lane ..... 80 N.C. 407 520
S. v. Lane ..... 166 N.C. 333 ..... 42, 306
S. v. Laney ..... 87 N.C. 536 139
S. v. Langley ..... 204 N.C. 687 306
S. v. Langley ..... 209 N.C. 178 470
S. v. Laughter ..... 159 N.C. 488 700
S. v. Law ..... 227 N.C. 103 141
S. v. Lawrence ..... 196 N.C. 562 42
S. v. Lawson ..... 101 N.C. 717 141
S. v. Lea ..... 203 N.C. 316 364
S. v. Lee ..... 193 N.C. 321 68
S. v. Lewis ..... 107 N.C. 967 564
S. v. Liles ..... 78 N.C. 496 420
S. v. Lilliston ..... 141 N.C. 857 68
S. v. Linney ..... 212 N.C. 739 306
S. v. Litteral ..... 227 N.C. 527 628
S. v. Lockey ..... 214 N.C. 525 60
S. v. Love ..... 19 N.C. 267 139
S. v. Lowery ..... 223 N.C. 598 216
S. v. Lueders ..... 214 N.C. 558 446
S. v. Luff ..... 198 N.C. 600 519
S. v. Lunsford ..... 229 N.C. 229 590
S. v. Lytle ..... 117 N.C. 799 42
S. v. McDowell ..... 101 N.C. 734 54
S. v. McIver ..... 175 N.C. 761 507
S. v. McLeod ..... 198 N.C. 649 167
S. v. McKay ..... 150 N.C. 813 626
S. v. McKinnon ..... 223 N.C. 160 42
S. v. McMahan ..... 228 N.C. 293 ..... 507, 665
S. v. McNeill ..... 225 N.C. 560 60
S. v. McRae ..... 200 N.C. 149 153
S. v. Manning ..... 221 N.C. 70 591
S. v. Marsh ..... 91 N.C. 632 139
S. v. Marshall ..... 208 N.C. 127 339
S. v. Maultsby ..... 139 N.C. 583 494
S. v. Maultsley ..... 139 N.C. 583 494
S. v. Maxwell ..... 215 N.C. 32 ..... 165, 167

S. v. Mays ..... 225 N.C. 486 ..... 305, 439
S. v. Merrick ..... 171 N.C. 788 165
S. v. Merritt ..... 61 N.C. 134 43
S. v. Miller ..... 197 N.C. 445 ..... 170, 171, 311
S. v. Miller ..... 212 N.C. 361 213
S. v. Miller ..... 219 N.C. 514 306
S. v. Miller ..... 220 N.C. 660 507
S. v. Mills ..... 181 N.C. 530 636
S. v. Mincher ..... 172 N.C. 895 239
S. v. Minton ..... 228 N.C. 15 654
S. v. Minton ..... 228 N.C. 518 213
S. v. Montague ..... 195 N.C. 20 212
S. v. Moore ..... 185 N.C. 637 665
S. v. Moore ..... 210 N.C. 459 216
S. v. Moore ..... 210 N.C. 686 ..... 24, 153, 628
S. v. Morgan ..... 226 N.C. 414 420
S. v. Morse ..... 171 N.C. 777 665
S. v. Muse ..... 219 N.C. 226 166
S. v. Muse ..... 229 N.C. 536 44
S. v. Myers ..... 202 N.C. 351 ..... 306, 628
S. v. Nash ..... 226 N.C. 608 24
S. v. Negro Will ..... 18 N.C. 121 304
S. v. Nipper ..... 166 N.C. 272 238
S. v. Noblett ..... 47 N.C. 418 471
S. v. Noland ..... 204 N.C. 329 626
S. v. Oakley ..... 210 N.C. 206 470
S. v. Owenby ..... 226 N.C. 521 ..... 471, 667
S. v. Oxendine ..... 224 N.C. 825 ..... 626, 628
S. v. Payne ..... 213 N.C. 719 ..... 311, 415
S. v. Pennell ..... 224 N.C. 622 654
S. v. Penry ..... 220 N.C. 248 212
S. v. Perry ..... 225 N.C. 174 626
S. v. Perry ..... 231 N.C. 467 667
S. v. Peterson ..... 226 N.C. 255 60
S. v. Pettaway ..... 10 N.C. 623 54
S. v. Phipps ..... 32 N.C. 17 139
S. v. Poythress ..... 174 N.C. 809 636
S. v. Puett ..... 210 N.C. 633 471
S. v. Pulliam ..... 184 N.C. 681 166
S. v. Quick ..... 150 N.C. 820 591
S. v. Ray ..... 212 N.C. 725 43
S. v. Ray ..... 229 N.C. 40 ..... 213, 339
S. v. Redman ..... 217 N.C. 483 ..... 165, 172
S. v. Reed ..... 9 N.C. 454 304
S. v. Reid ..... 230 N.C. 561 507
S. v. Revels ..... 227 N.C. 34 60
S. v. Revis ..... 193 N.C. 192 238
S. v. Reynolds ..... 95 N.C. 616 ..... 139, 140
S. v. Rhinehart ..... 209 N.C. 150 667
S. v. Rhodes ..... 210 N.C. 473 470
S. v. Richardson ..... 216 N.C. 304 153
S. v. Riley ..... 113 N.C. 648 170
S. v. Rising ..... 223 N.C. 747 413
S. v. Ritter ..... 199 N.C. 116 439
S. v. Roberson ..... 215 N.C. 784 413

S. v. Robinson ..... 188 N.C. 784 339
S. v. Robinson ..... 229 N.C. 647 591
S. v. Roddey ..... 219 N.C. 532 654
S. v. Rogers ..... 162 N.C. 656 166
S. v. Rogers ..... 173 N.C. 755 470
S. v. Rountree ..... 181 N.C. 535 ..... 215, 216, 507
S. v. Rowe ..... 155 N.C. 436 591
S. v. Rumple ..... 178 N.C. 717 439
S. v. Sawyer ..... 224 N.C. 61 591
S. v. Schoolfield ..... 184 N.C. 721 213
S. v. Scoggins ..... 225 N.C. 71 ..... 42, 215
S. v. Sheffield ..... 206 N.C. 374 68
S. v. Shepherd ..... 220 N.C. 377 439
S. v. Shine ..... 222 N.C. 237 241
S. v. Shipman ..... 202 N.C. 518 167
S. v. Shu ..... 218 N.C. 387 212
S. v. Shuford ..... 128 N.C. 588 ..... 563, 564
S. v. Singleton ..... 183 N.C. 738 167
S. v. Slagle ..... 182 N.C. 894 667
S. v. Smith ..... 103 N.C. 410 636
S. v. Smith ..... 174 N.C. 804 44
S. v. Smith ..... 211 N.C. 206 446
S. v. Smith ..... 213 N.C. 299 153
S. v. Smith ..... 221 N.C. 278 305
S. v. Smith ..... 221 N.C. 400 213
S. v. Smith ..... 223 N.C. 457 153
S. v. Smith ..... 226 N.C. 738 60
S. v. Smoak ..... 213 N.C. 79 415
S. v. Sparks ..... 184 N.C. 745 167
S. v. Speaks ..... 95 N.C. 689 564
S. v. Speller ..... 229 N.C. 67 549
S. v. Speller ..... 230 N.C. 345 ..... 549, 550
S. v. Spillman ..... 210 N.C. 271 667
S. v. Spivey ..... 198 N.C. 655 167
S. v. Spruill ..... 225 N.C. 356 654
S. v. Stansell ..... 203 N.C. 69 ..... 216, 507
S. v. Stefanoff ..... 206 N.C. 443 306
S. v. Sterling ..... 200 N.C. 18 306
S. v. Stewart ..... 89 N.C. 563 167
S. v. Stewart ..... 210 N.C. 362 700
S. v. Stinnett ..... 203 N.C. 829 ..... 69, 141
S. v. Straughn ..... 197 N.C. 691 166
S. v. Suddreth ..... 223 N.C. 610 60
S. v. Suggs ..... 89 N.C. 527 699
S. v. Sullivan ..... 229 N.C. 251 716
S. v. Sultan ..... 142 N.C. 569 426
S. v. Swink ..... 151 N.C. 726 667
S. v. Tankersly ..... 172 N.C. 955 ..... 215, 216
S. v. Telfair ..... 130 N.C. 645 636
S. v. Terrell ..... 212 N.C. 145 339
S. v. Thompson ..... 224 N.C. 661 153
S. v. Thompson ..... 227 N.C. 19 ..... 153, 626, 628
S. v. Tillman ..... 146 N.C. 611 212
S. v. Traylor ..... 121 N.C. 674 665
S. v. Trexler ..... 4 N.C. 188 139

S. v. Trott ..... 190 N.C. 674 ..... 304, 507
S. v. Truelove ..... 224 N.C. 147 165
S. v. Trust Co. ..... 192 N.C. 246 ..... 74, 75
S. v. Tucker ..... 190 N.C. 708 167
S. v. Turner ..... 119 N.C. 841 564
S. v. Turner ..... 220 N.C. 437 470
S. v. Tyndall ..... 230 N.C. 174 ..... 107, 108
S. v. Tyson ..... 138 N.C. 627 53
S. v. Vick ..... 213 N.C. 235 ..... 189, 402
S. v. Wagstaff ..... 219 N.C. 15 665
S. v. Waldroop ..... 193 N.C. 12 68
S. v. Walters ..... 208 N.C. 391 166
S. v. Walton ..... 186 N.C. 485 42
S. v. Warren ..... 228 N.C. 22 213
S. v. Watson ..... 208 N.C. 70 ..... 24, 162, 217, 510
S. v. Watts ..... 224 N.C. 771 339
S. v. Webster ..... 121 N.C. 586 139
S. v. Weinstein ..... 224 N.C. 645 ..... 326, 626
S. v. Wells ..... 142 N.C. 590 140
S. v. Westmoreland ..... 181 N.C. 590 306
S. v. Weston ..... 197 N.C. 25 470
S. v. Whaley ..... 191 N.C. 387 665
S. v. Whitaker ..... 228 N.C. 352 397
S. v. Whitehurst ..... 70 N.C. 85 141
S. v. Wilcox ..... 132 N.C. 1120 42
S. v. Williams ..... 185 N.C. 685 626
S. v. Williams ..... 186 N.C. 627 ..... 317, 318
S. v. Williams ..... 216 N.C. 446 ..... 153, 306
S. v. Williams ..... 224 N.C. 183 531
S. v. Wilson ..... 32 N.C. 131 54
S. v. Wilson ..... 205 N.C. 376 699
S. v. Wilson ..... 218 N.C. 556 626
S. v. Wilson ..... 221 N.C. 365 242
S. v. Wilson ..... 227 N.C. 43 60
S. v. Winckler ..... 210 N.C. 556 ..... 471, 667
S. v. Windley ..... 178 N.C. 670 167
S. v. Winslow ..... 95 N.C. 649 141
S. v. Wise ..... 225 N.C. 746 153
S. v. Wood ..... 230 N.C. 740 ..... 108, 339
S. v. Woodard ..... 218 N.C. 572 42
S. v. Wrenn ..... 198 N.C. 260 213
S. v. Yellowday ..... 152 N.C. 793 140
Staub, *In re* Will of ..... 172 N.C. 138 ..... 70, 259
Steelman, *In re* ..... 219 N.C. 306 ..... 384, 385
Stephens Co. v. Homes Co. ..... 181 N.C. 335 248
Stephenson v. Duke University 202 N.C. 624 13
Stewart v. Carpet Co. ..... 138 N.C. 60 418
Stewart v. Stewart ..... 195 N.C. 476 8
Stewart v. Wyrick ..... 228 N.C. 429 47
Stiers, *In re* ..... 204 N.C. 48 365
Stocks, *In re* Will of ..... 175 N.C. 224 71
Stonestreet v. Oil Co. ..... 226 N.C. 261 102
Stovall v. Ragland ..... 211 N.C. 536 536
Stowe v. Gastonia ..... 231 N.C. 157 541
Strause v. Ins. Co. ..... 128 N.C. 64 455

Stricklin v. Davis....196 N.C. 161.... 721
Sturdevant v. Cotton Mills....171 N.C. 119.... 579
Sugg v. Pollard....184 N.C. 494.... 30
Suit v. Suit.... 78 N.C. 272.... 579
Sumner v. Young.... 65 N.C. 579.... 730
Supply Co. v. Board of Education....199 N.C. 575.... 160
Supply Co. v. Lumber Co....160 N.C. 428.... 195
Suskin v. Hodges....216 N.C. 333.... 373, 694
Sutton v. Quinerly....228 N.C. 106.... 674, 675, 676, 677
Swain v. Goodman....183 N.C. 531.... 64, 196
Swann v. Myers.... 75 N.C. 585.... 588
Swindell v. Latham....145 N.C. 144.... 646
Swindell v. Warden.... 52 N.C. 575.... 564
Swink v. Horn....226 N.C. 713.... 579
Sykes v. Blakey....215 N.C. 61.... 426

T

Tarkington v. Printing Co....230 N.C. 354.... 197, 705
Tarrant v. Bottling Co....221 N.C. 390.... 378, 496
Tatham v. Ins. Co....181 N.C. 434.... 457
Tayloe v. Johnson.... 63 N.C. 381.... 679
Taylor v. Hodge ....229 N.C. 558.... 632
Taylor, *In re*....229 N.C. 297.... 25, 341
Taylor, *In re*....230 N.C. 566.... 25, 341
Taylor v. Iron Co.... 94 N.C. 525.... 319
Templeton v. Kelley....216 N.C. 487.... 535
Tenhoopen *In re*....202 N.C. 223.... 93
Terry v. Coal Co....231 N.C. 103.... 156, 333, 344, 598
Thayer v. Thayer....187 N.C. 573.... 559
Therrell v. Clanton....210 N.C. 391.... 545
Thomas v. Houston....181 N.C. 91.... 352
Thomason v. Hackney....159 N.C. 299.... 15
Thompson v. Batts....168 N.C. 333.... 545
Thompson v. Humphrey....179 N.C. 44.... 394
Thompson v. Smith....156 N.C. 345.... 63
Thompson v. Thompson.... 72 N.C. 32.... 93
Threadgill v. R. R.... 73 N.C. 178.... 565
Tieffenbrun v. Flannery....198 N.C. 397.... 319
Tilley v. Bivens....110 N.C. 343.... 579
Tillman v. Sinclair.... 23 N.C. 183.... 221
Townsend v. Coach Co....229 N.C. 523.... 82, 83
Trogden v. Williams....144 N.C. 192.... 588
Troitino v. Goodman....225 N.C. 406.... 14
Truelove v. Parker....191 N.C. 430.... 9
Trull v. R. R....151 N.C. 545.... 319
Trust Co. v. Board of National Missions ....226 N.C. 546.... 691
Trust Co. v. Brock ....196 N.C. 24.... 214
Trust Co. v. Cooke ....204 N.C. 566.... 579
Trust Co. v. Frazelle ....226 N.C. 724.... 155
Trust Co. v. Heymann ....220 N.C. 526.... 596
Trust Co. v. Ins. Co. ....173 N.C. 558.... 730
Trust Co. v. Lumber Co. ....221 N.C. 89.... 579
Trust Co. v. Rasberry ....226 N.C. 586.... 296

Trust Co. v. Shelton .....229 N.C. 150..... 679
Trust Co. v. Stevenson .....196 N.C. 29..... 394
Trust Co. v. Transit Lines .....198 N.C. 675..... 284
Tryon v. Power Co.....222 N.C. 200..... 117, 118
Tucker v. Eatough.....186 N.C. 505..... 526
Turlington v. Neighbors.....222 N.C. 694..... 56, 579
Turnage, *In re* Will of.....208 N.C. 130..... 260
Turner v. Glenn.....220 N.C. 620..... 248, 252
Turner v. Reidsville.....224 N.C. 42..... 50, 446
Turpin v. Jarrett.....226 N.C. 135..... 222
Tuttle v. Building Corp.....228 N.C. 507..... 461
Tyer v. Lumber Co.....188 N.C. 274..... 487
Tyer v. Meadows.....215 N.C. 733..... 709
Tyler v. Mahoney.....166 N.C. 509..... 633
Tyler v. Morris..... 20 N.C. 625..... 25
Tysinger v. Dairy Products.....225 N.C. 717..... 380
Tyson v. Ford.....228 N.C. 778.....109, 208, 406, 476, 496

U

Unemployment Compensation
Com v. Harvey & Son Co.....227 N.C. 291..... 384
University v. Borden.....132 N.C. 476..... 393
Utilities Com. v. R. R.....224 N.C. 762..... 736

V

Van Amringe v. Taylor.....108 N.C. 196..... 564
Vaughan v. Vaughan.....211 N.C. 354..... 363
Veazey v. Durham.....231 N.C. 354..... 360, 363
Venable v. School Committee.....149 N.C. 120..... 663
Vernon v. Realty Co.....226 N.C. 58..... 252
Vestal v. Machine Co.....219 N.C. 468..... 579, 580
Vickers v. Logan..... 44 N.C. 393..... 633
Vinson v. Gardner.....185 N.C. 193..... 120, 222
Voorhees v. Porter.....134 N.C. 591..... 651

W

Wadesboro v. Coxe.....216 N.C. 545..... 364
Waggoner v. Publishing Co.....190 N.C. 829..... 397
Wagner v. Conover.....200 N.C. 82..... 542
Waldroup v. Ferguson.....213 N.C. 198..... 460
Walker v. Manson.....222 N.C. 527..... 684
Walker v. Miller.....139 N.C. 448..... 526
Wallace, *In re*.....212 N.C. 490..... 647
Wallace, *In re* Estate of.....197 N.C. 334..... 8
Wallace v. Wallace.....181 N.C. 158..... 328
Walters v. Walters.....172 N.C. 328..... 64
Ward v. Howard.....217 N.C. 201..... 9
Ward v. Smith.....223 N.C. 141..... 683
Ward v. Stow..... 17 N.C. 509..... 121
Warner v. Lazarus.....229 N.C. 27..... 276, 706
Warren v. Bottling Co.....204 N.C. 288..... 284
Warren v. Maxwell.....223 N.C. 604..... 639
Washburn v. Biggerstaff.....195 N.C. 624..... 220
Wasson v. King..... 19 N.C. 262..... 588

Waste Co. v. Mfg. Co.....168 N.C. 92..... 336
Watkins v. Furnishing Co.....224 N.C. 674..... 548
Watson v. Hinson.....162 N.C. 72..... 255
Watson v. Lee County.....224 N.C. 508..... 391
Weaver v. Chunn..... 99 N.C. 431..... 554, 560
Webb v. Chemical Co.....170 N.C. 662..... 570
Webb v. Eggleston.....228 N.C. 574.....75, 319, 467
Webber v. Webber..... 79 N.C. 572..... 130
Weil v. Weil.....212 N.C. 764..... 220
Weir v. Weir.....196 N.C. 268..... 33
Welch v. Kinsland..... 93 N.C. 281..... 362
Wells v. Odum.....205 N.C. 110..... 503, 504
Wendell v. Scarboro.....213 N.C. 540..... 721
Wescott v. Bank.....227 N.C. 39..... 353
Wessell v. Rathjohn..... 89 N.C. 377..... 658
West, *In re* Will of.....227 N.C. 204..... 259
West v. Murphy.....197 N.C. 488..... 617, 690
West v. R. R.....140 N.C. 620..... 38
Westfeldt v. Reynolds.....191 N.C. 802..... 220
Westmoreland v. Lowe.....225 N.C. 553..... 56
Westover Canal, *In re*.....230 N.C. 91..... 133
Wheeler v. Cobb..... 75 N.C. 21..... 559
Wheeler v. Wilder.....229 N.C. 379..... 691
Whitaker v. Petway..... 26 N.C. 182..... 31
White v. Chappell.....219 N.C. 652..... 210
White v. Comrs. of Johnston.....217 N.C. 329..... 694
Whitehead & Anderson, Inc.
v. Branch .....220 N.C. 507..... 288
Whitfield v. Douglas.....175 N.C. 46..... 220
Whitley v. Arenson.....219 N.C. 121..... 328, 329
Whitley v. McIver.....220 N.C. 435..... 220, 227
Wickham v. Harper..... .....225 N.C. 260..... 693
Wilkinson v. Wilkinson.....159 N.C. 265..... 633
Williams v. Averitt..... 10 N.C. 308..... 471
Williams v. Beeman..... 13 N.C. 483..... 81
Williams v. Express Lines .....198 N.C. 193..... 407, 423
Williams v. Harrington ..... 33 N.C. 616..... 123
Williams v. Hughes .....139 N.C. 17..... 51
Williams v. Lewis .....100 N.C. 142..... 220
Williams v. R. R. .....200 N.C. 771..... 119
Williams v. Rand .....223 N.C. 734.....220, 227, 679, 690, 691
Williams v. Wallace ..... 78 N.C. 354..... 141
Williamson v. Cox.....218 N.C. 177..... 220, 328
Willis v. Trust Co.....183 N.C. 267..... 222, 545
Wilson v. Bryan.....195 N.C. 360..... 438
Wilson v. Chastain.....230 N.C. 390..... 318, 319, 320, 467, 641, 651
Wilson v. Mooresville.....222 N.C. 283..... 480
Wilson v. Motor Lines.....230 N.C. 551..... 208
Wilson v. Robinson.....224 N.C. 851..... 579, 580
Wilson v. Seagle..... 84 N.C. 110..... 365
Wilson v. Stafford..... 60 N.C. 646..... 393
Winborne, *In re* Will of.....231 N.C. 463..... 487
Winborne v. McMahan.....206 N.C. 30..... 403
Winchester v. Byers.....196 N.C. 383..... 569, 570
Winfield v. Smith.....230 N.C. 392..... 422, 632

Winfield v. Winfield....228 N.C. 256.... 323
Winslow v. Carolina Conference Asso. ....211 N.C. 571.... 479
Winslow Co. v. Cutler....205 N.C. 206.... 363
Winston v. Lumber Co....227 N.C. 339.... 651
Withers v. Black....230 N.C. 428.... 479
Withers v. Lane....144 N.C. 184.... 167, 667
Womack v. Carter....160 N.C. 286.... 74
Womble v. Grocery Co....135 N.C. 474.... 418
Wood v. Miller....226 N.C. 567.... 372
Wright v. Allred....226 N.C. 113.... 56
Wright v. Howe.... 52 N.C. 412.... 260
Wright v. McGee....206 N.C. 52.... 118, 532
Wright v. Wright....229 N.C. 503....161, 180, 185
Wyatt v. Coach Co....229 N.C. 340.... 735

Y

Yarn Co. v. Dewstoe....192 N.C. 121.... 222
Yates v. Ins. Co....176 N.C. 401.... 362
Yelverton, *In re* Will of....198 N.C. 746.... 30
York v. York....212 N.C. 695.... 538
Young v. Harris....176 N.C. 631.... 393
Young, *In re*....137 N.C. 552.... 439

Z

Zebulon v. Dawson....216 N.C. 520.... 51
Zibelin v. Ins. Co....229 N.C. 567.... 456
Ziegler v. Love....185 N.C. 40.... 120, 222

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1949

IN THE MATTER OF THE ADOPTION OF JANE DOE, MINOR, BY JAMES T. McCRAW AND LOUISE M. McCRAW, HIS WIFE.

(Filed 2 November, 1949.)

1. Bastards § 15—

Where the mother and the reputed father of a child born out of wedlock thereafter marry, the child acquires the status of legitimacy which accompanies it wherever it goes and is determinative of the rights and duties of the parents as to its custody and support. G.S. 49-12 as amended by chap. 663, sec. 2, Laws of 1947.

2. Appeal and Error § 51c—

A decision of the Supreme Court must be interpreted with reference to the framework of the particular case.

3. Adoption §§ 4, 7, 8—Upon marriage of mother and reputed father, proceedings for adoption upon consent of mother should be revoked.

Where proceeding for the adoption of a child born out of wedlock is instituted in conformity with the statute upon the written consent of its mother, G.S. 48-5, but its mother and reputed father marry prior to an order of reference directing the Superintendent of Public Welfare of the county to make a full investigation to determine if the child is a proper child for adoption, etc., and the natural parents intervened and moved to vacate and dismiss the proceeding, *held* at the time of the reference and at the time the court came to determine whether "the child is the proper subject for adoption," G.S. 48-3, G.S. 48-4, G.S. 48-5, the status of the child had changed from illegitimate to legitimate, and the motion of interveners to vacate the proceeding and for the custody of their child should have been allowed, it being required in a proceeding for the adoption of a

legitimate child that its natural parents be parties or their consent to the adoption be made to appear unless they had abandoned the child. G.S. 14-322, G.S. 14-326. The institution of bastardy proceedings against the father prior to the birth of the child is in itself insufficient to establish such abandonment.

APPEAL by interveners, Hubert C. Wilder and his wife, Elizabeth May Wilder, minors, by their next friend, W. C. Wilder, from *Bone, J.*, at Chambers in Nashville, North Carolina, 5 August, 1949. From WILSON.

Proceeding for the adoption of a minor child born out of wedlock, at Rocky Mount, in Nash County, N. C., instituted 1 January, 1949, before Clerk of Superior Court of Wilson County, N. C., in which proceeding the natural parents, after marriage 4 January, 1949, intervened on 4 June, 1949, and moved to vacate and dismiss the proceeding.

The record discloses that the procedure in this adoption proceeding up to and including the interlocutory order, dated 28 February, 1949, seems to follow the provisions of the General Statutes of North Carolina, Chapter 48, as amended by Chapter 281 of P.L. 1941, pertaining to the adoption of a minor child, applicable to a case where the child is born out of wedlock, and the mother of the child releases all rights to the child, and surrenders it to the Superintendent of Public Welfare of the county for placement and adoption, and consents to the adoption by any person selected by him. See G.S. 48-4 and G.S. 48-5 as amended by P.L. 1941, Chapter 281.

The record shows that an order of reference was made on 7 January, 1949, by Clerk of Superior Court of Wilson County, directing James A. Glover, Superintendent of Public Welfare of Nash County to "make a full, careful and complete investigation of the conditions and antecedents of the said minor for the purpose of ascertaining whether she is a proper subject for adoption," etc.

The record further shows that an interlocutory order was entered in the proceeding by the Clerk of Superior Court of Wilson County, N. C., on 28 February, 1949, in which after reciting the representations set forth in the petition and, further, that "whereas upon examination and consideration of the reports of the investigating officials assigned to this case, and other evidence now available to the court, it is found by the court that the home of the petitioners is a proper and suitable home in which to place the said Jane Doe and that the said minor is a fit subject for adoption, and that the adoption of said minor by said petitioners is for the best interest of the said child," the court tentatively approved the adoption of said child by the petitioners, and ordered that she "be, and is hereby placed in the care and custody of petitioners until further orders of this court." The court further "expressly ordered that this order shall be provisional only and may be rescinded or modified at any time prior to

final order of adoption which shall be made not less than one year or more than two years after this date," and "that until said final order of adoption the said minor shall be and remain a ward of this court, and its care shall be under the supervision of Monroe Fulghum, Superintendent of Public Welfare of Wilson County, unless otherwise directed by the court."

The motion of the interveners, filed 4 June, 1949, in substance and in material part, is predicated upon these allegations: That they, the natural parents of the child, the subject of the proceeding, made definite plans on 31 December, 1948, to intermarry; that about 8:30 o'clock a.m., on 3 January, 1949, they gave oral notice thereof to James A. Glover, County Superintendent of Public Welfare of Nash County; that they were intermarried at 5 o'clock a.m., on 4 January, 1949, at Dillon, in the State of South Carolina; that thereby their child was legitimated, upon which "all basis for adoption expired"; that thereupon they proceeded directly to the office of the said James A. Glover at Nashville, North Carolina, arriving at approximately 10 o'clock a.m., on same day, and gave to him notice of their intermarriage,—exhibiting to him a certificate of their marriage, and demanded to have the care and custody of their child, to which he, the said Glover, answered, "It's too late," and declined to give them information as to the whereabouts of the child, or as to pendency of the adoption proceeding in Wilson County, and continued to ignore their pleas for, and as to the whereabouts of their child,—as well as to ignore their legal status as legitimate parents of the child, and that despite all of which he continued to participate in the proceeding; that the notice of the marriage given to the Superintendent of Public Welfare of Nash County, and the demand for the child was adequate notice of the legitimation of the child and of the mother's withdrawal of any consent to the custody and adoption of her child which she may have previously given; that by reason of legitimation of the child by the marriage of her parents on 4 January, 1949, the order of reference on 7 January, 1949, and the interlocutory order of 28 February, 1949, as well as intermediate proceedings, whatever such proceedings may have been, their contents being denied to them, were void; and that they, the interveners, are entitled to the care and custody of their child.

While the petitioners, in reply to the averments in the motion of interveners, plead the regularity of the adoption proceeding upon the consent of the mother of the child, they say (1) that they "are advised and so believe that on January 3, 1949, one W. C. Wilder went to see James A. Glover, County Superintendent of Public Welfare of Nash County, at his office in Nashville, North Carolina, and thereupon . . . advised . . . Glover that he, Wilder, was of the opinion that Elizabeth May Jacobs (Wilder) and Hubert C. Wilder might marry in the event that they would thereby be able to secure custody of the child, which is the subject

of this proceeding"; (2) that "it is not denied that Hubert C. Wilder and Elizabeth May Jacobs (Wilder) were married on January 4, 1949"; (3) that "petitioners are informed, advised, and so aver that on January 4, 1949, Elizabeth May Jacobs (Wilder) went into the office of James A. Glover alone and advised him of her marriage"; (4) that "it is not denied that Hubert C. Wilder, the alleged father of said child, has not consented to its adoption"; and (5) that "petitioners admit that Section 12 of Chapter 49 of the General Statutes of North Carolina apply as between Hubert C. Wilder and the child, which is the subject of this adoption proceeding."

And petitioners further say that the intervener, Hubert C. Wilder, denied paternity of the child consistently prior to 4 January, 1949, and failed and refused to "make any provision for its maintenance and support prior" thereto, and that in consequence Elizabeth May Jacobs (Wilder) swore out a warrant against him in the Recorder's Court of Nash County on 13 September, 1948, alleging his paternity of the child, and failure to support it.

The record also contains purported copy of warrant, and of the affidavit upon which the warrant was issued, together with bond for appearance of Hubert C. Wilder in the Recorder's Court at Nashville, N. C., on 4 October, 1948, which the Clerk of Superior Court of Nash County certifies are true copies of such papers "in a certain criminal action lately pending in the Recorder's Court of this County wherein the State of North Carolina was prosecutor and Hubert Cordell Wilder was the defendant, as the same is taken from and compared with the original which is on file in this office."

The record also contains affidavits of twenty-nine persons, men and women, mostly of Nash County, and some of Franklin County, who say they have known Hubert C. Wilder and his wife, Elizabeth May Wilder, for various periods of time, from 7 to 20 years; that they intermarried subsequent to the birth of their child; that otherwise their general reputation and character in the community in which they live is good; that they are suitable persons to have the care and custody of their child; that each believes they will provide a good home for themselves and their child; and that the custody of their child should be awarded to them.

When the cause came on for hearing on 27 June, 1949, upon the said motion of interveners, and after consideration thereof, the Clerk of Superior Court made extensive findings of fact,—the material portions of which in summary are these:

1. That the child, which is the subject of the proceeding, was born to Elizabeth M. Jacobs (Wilder) out of wedlock, on 6 December, 1948, in Park View Hospital, Rocky Mount, N. C.

2. That prior to the birth of this child, Hubert C. Wilder was its putative father, and that (he denied paternity and refused to contribute to its support). (The portion in parenthesis was disapproved by the judge on appeal as hereinafter shown.)

3. That Elizabeth May Jacobs (Wilder) caused a warrant to be issued from the Recorder's Court of Nash County, North Carolina, against Hubert C. Wilder on 13 September, 1948, in which she complained that he had denied paternity of the child and had failed and refused to maintain and support the child; and that the criminal proceeding was pending at the date of the birth of the child, as well as at the time the child was placed in the custody of the petitioners, and at the time of the institution of this adoption proceeding.

4. That on 8 December, 1948, Elizabeth May Jacobs (Wilder) executed a written consent and surrender, in due form, releasing all her rights in, and claim to her said child to the Superintendent of Public Welfare of Nash County, North Carolina, and granting to him authority to place her child in a foster home selected by him with the privilege of legal adoption, without further notice to her.

5. That on 20 December, 1948, Elizabeth May Jacobs (Wilder) executed in conformity with law and voluntarily a request for the separation from her of her infant child under six months of age, and James A. Glover, Superintendent of Public Welfare of Nash County, North Carolina, executed his acceptance thereof on 23 December, 1948, and on same day executed his approval of the separation, all in due form and in compliance with the law for such cases.

6. That the child, the subject of this proceeding, was placed in the home of the petitioners on 23 December, 1948.

7. That the petition for adoption of the child by James T. McCraw and wife, Louise M. McCraw, was filed 1 January, 1949.

8. That James A. Glover, Superintendent of Public Welfare of Nash County, North Carolina, executed his consent to the adoption of this child by petitioners on 3 January, 1949.

9. That Elizabeth May Jacobs, the mother of the child, the subject of this proceeding, and Hubert C. Wilder, its putative father, were married at 5 o'clock a.m., on 4 January, 1949.

10. That an order of reference was entered in the cause on 7 January, 1949, directing James A. Glover, Superintendent of Public Welfare of Nash County, North Carolina, to make a full, careful and complete investigation of the conditions and antecedents of said child to determine if she was a proper child for adoption, etc.

11. And upon an examination and consideration of the reports of the investigating officials so assigned, and other evidence, the Clerk of Supe-

rior Court of Wilson County entered an interlocutory order on 28 February, 1949.

12. That on 4 June, 1949, W. C. Wilder, as next friend (duly appointed) of Hubert C. Wilder and Elizabeth May Jacobs Wilder, filed a motion on their behalf to dismiss the adoption proceeding.

13. That the petitioners are fit persons to become adoptive parents of the child, and have assumed obligations on behalf of said child and have made far-reaching plans and provisions for its future, and it is to the best interest of the child that she remain in the home of the petitioners.

Upon the findings of fact, the Clerk on 2 July, 1949, "ordered, adjudged and decreed:

"1. That this proceeding is properly constituted in the form required by law.

"2. That the motion herein filed by Hubert C. Wilder and Elizabeth May Jacobs Wilder, by their next friend, W. C. Wilder, to vacate the petition, the order of reference, the consent of the County Superintendent of Public Welfare of Nash County, and the interlocutory order entered in this cause be, and the same is hereby denied.

"3. That the motion for a final order to be entered herein delivering the custody of the minor child to Hubert C. Wilder and Elizabeth May Jacobs Wilder be, and the same is hereby denied.

"Let the cause be retained to the end that such other and further orders may be entered hereafter as may by the court be considered just and proper."

From this order W. C. Wilder, as next friend of Hubert C. Wilder and Elizabeth May Wilder, appealed to the judge of the Superior Court. On such appeal interveners applied for an order permitting them and their attorneys to inspect the confidential reports of the welfare officer in respect to the adoption of the child. The application was denied, and they except.

And on such appeal the judge, resident of the Second Judicial District, entered judgment in which it is stated that "the court is of the opinion that while some of the clerk's findings of fact are not necessary upon an adjudication of the motion, nevertheless, all of them are supported by the evidence, except that portion of finding which states that 'he denied paternity and refused to contribute to its support.' With the exception of this finding the court approves the clerk's findings of facts as set out in his order which is here appealed from. Upon the facts found the court is of the opinion that the said order of the clerk denying appellants' motion is correct in law,"—and thereupon affirmed the order.

The interveners appeal therefrom to Supreme Court and assign error.

F. L. Carr and Lucas & Rand for petitioners, appellees.

M. Butler Prescott and G. L. Parker for interveners, appellants.

WINBORNE, J. The question of law raised by the appellants upon the facts of this case relate to, and is determined by the legal effect the intermarriage of the mother of the child, born out of wedlock, and the reputed father, has upon the status of the child as a proper subject for adoption in an adoption proceeding, then pending,—based upon consent of the mother in a manner provided by the statute. G.S. 48-5. This exact question does not appear to have been considered and passed upon by this Court. Yet we find guidance in pertinent statutes of this State, and related decisions of this Court.

The statute, pertaining to legitimation of children born out of wedlock, provides that "when the mother of any child born out of wedlock and the reputed father of such child intermarry or shall have intermarried at any time after the birth of the child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock." P.L. 1917, Chapter 219, Sec. 1, later C.S. 279 and now G.S. 49-12 as amended by Laws 1947, Chapter 663, Sec. 2.

By this statute, upon the happening of the event of intermarriage of the mother of a child, born out of wedlock, and the reputed father of such child, the status of the child is transmuted from that of illegitimacy to that of legitimacy in all respects, except as to rights of inheritance. This Court has held that "legitimacy is a status," and accompanies the child wherever it goes. *Fowler v. Fowler,* 131 N.C. 169, 42 S.E. 563. Status is "the legal position of the individual in or with regard to the rest of the community." Black's Law Dictionary, 3rd Ed.

Indeed, in the case of *Fowler v. Fowler, supra,* decided in the year 1902, long before the enactment of the statute in 1917, now under consideration, this Court adverted to the effect of an Illinois statute of similar import. There the father, then a resident of North Carolina, instituted an action here to legitimate his child born out of wedlock in the State of Illinois. This Court, in dismissing the action *ex mero motu,* had this to say in an opinion by *Clark, J.:* "This proceeding is provided to legitimate illegitimates, but it appears from the averments in the complaint that the child is already legitimated. By the laws of this State the subsequent marriage of the parent does not legitimate their children born prior to the marriage. But legitimacy is a *status,* and by the laws of Illinois the subsequent marriage of the parents legitimates their prior offspring. 'If the mother of any bastard child and the reputed father shall, at any time after its birth intermarry, the said child shall in all

respects be deemed and held legitimate.' Rev. Stat. (1895), page 203, Sec. 15. The parties were domiciled, according to the complaint, at the time of the child's birth and up to the time of the marriage in Illinois, and it is well settled that the child, being still a minor, its legitimacy then accrued and accompanies it wherever it goes."

And in Vernier's American Family Laws, Vol. IV, Sec. 246, the author states that, in general, "Statutes providing for the legitimation of the child by the intermarriage of its parents ordinarily have the effect of rendering the child legitimate for all purposes." And the author adds this note: "If the child becomes fully legitimate, it follows that he should be treated as a child born in lawful wedlock in determining rights and duties of parent and child, such as custody, support and inheritance."

This would seem to be the reasonable and logical meaning of G.S. 49-12. In declaring in this statute that "the child shall in all respects after such intermarriage be deemed and held to be legitimate," the General Assembly clearly intended that the child should be treated as a child born in lawful wedlock in determining the rights and duties of parent and child as to custody and support.

However, as to the right of inheritance provided for, in G.S. 49-12, this Court has construed the statute in these cases: *Bowman v. Howard,* 182 N.C. 662, 110 S.E. 98; *Stewart v. Stewart,* 195 N.C. 476, 142 S.E. 577; *In re Estate of Wallace,* 197 N.C. 334, 148 S.E. 456; *Reed v. Blair,* 202 N.C. 745, 164 S.E. 118. There the Court was only considering the result of the change in the status of the child, brought about by the marriage of the mother to the reputed father, as to "rights in and to the estate, real and personal, of its father and mother." And "the law discussed in any opinion is set within the framework of that particular case," said *Barnhill, J.,* in *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10. See also *S. v. Crandall,* 225 N.C. 148, 33 S.E. 2d 861, and cases there cited. In this light, nothing said by the Court in those cases, *Bowman v. Howard, supra,* and the others *supra,* is in conflict with what is said otherwise hereinabove as to the effect such intermarriage has upon the status of the child.

Therefore, while at the time of the institution of the present adoption proceeding on 1 January, 1949, the status of the child sought to be adopted was that of illegitimacy, the status of the child, after the intermarriage of her mother and her reputed father, at 5 o'clock a.m., on 4 January, 1949, was that of legitimacy. The transmutation in her status came about by operation of law. Thus when the order was made referring the case to the County Superintendent of Public Welfare of Nash County, "to investigate the conditions and antecedents of the child for the purpose of ascertaining whether she is a proper subject for adoption," and when the Superintendent made written report of his findings for

examination by the court of adoption, all as required by G.S. 48-3, and when the court of adoption came to determine whether "the child is a proper subject for adoption," as required in G.S. 48-5, the subject under investigation and consideration was a legitimate child—of natural parents, who as such had not consented to the adoption. And the court of adoption should have so treated and considered the child in determining whether she was a proper subject for adoption as required before tentative order of adoption be entered. G.S. 48-5. True it is, that prior to the intermarriage of the parents the mother had set in motion her consent to an adoption in a method provided by the statute. But she did so at a time when the child occupied the status of illegitimacy. At that time her consent to the adoption of her child, born out of wedlock, is all that the law seems to require. *Ashby v. Page,* 106 N.C. 328, 11 S.E. 283; *In re Shelton,* 203 N.C. 75, 164 S.E. 332; *In re Foster,* 209 N.C. 489, 183 S.E. 744; *In re McGraw,* 228 N.C. 46, 44 S.E. 2d 349. However, when the status of the child became legitimate, upon intermarriage of her parents, the consent of the mother previously given was no longer sufficient to render the child a proper subject for adoption. Rather it is more reasonable that such consent previously given was revoked by operation of law. But be that as it may, under the statutes, now G.S. 48-4 and G.S. 48-5, read together, the parents of the child must be parties to this adoption proceeding, or their consent to the adoption must be made to appear, unless, perchance, they had willfully abandoned the child within the meaning of the criminal statute pertaining to abandonment. G.S. 14-322 and G.S. 14-326. See *Truelove v. Parker,* 191 N.C. 430, 132 S.E. 295; *Ward v. Howard,* 217 N.C. 201, 7 S.E. 2d 625. And on this record there is no finding that either of the parents of the child had willfully abandoned her. A finding that a warrant was issued against the reputed father, as shown, three months before the birth of the child is insufficient.

Hence, in the light of the rulings, applied to the facts of this case, as hereinabove set forth, we hold that the child sought to be adopted was not a proper subject for adoption at the time the court of adoption entered the tentative order of adoption on 28 February, 1949. Therefore, the court was without authority to make the order. Thus there is error in the denial of interveners' motion to vacate the proceeding and for the custody of their child.

The cause will be remanded for further proceedings in accordance with this opinion.

Reversed.

BLUMMER WADDELL LAMM v. W. W. SHINGLETON, EDWARD E. SHINGLETON, W. W. SHINGLETON, JR., AND GERALD SHINGLETON, T/A HUNT FUNERAL HOME.

(Filed 2 November, 1949.)

1. Trial §§ 22b, 26—

Where at the close of plaintiff's evidence, nonsuit is entered on one of the causes of action, that cause is no longer pending, and defendant's evidence thereafter introduced cannot be considered in determining the correctness of the nonsuit.

2. Dead Bodies § 2½—

Where, in an action for breach of contract to furnish a watertight vault, plaintiff's evidence tends to show that water and mud entered the vault by reason of the fact that the top was not locked to the base at one end at the time of the original interment, but offers no evidence tending to show that the vault was not waterproof as represented by defendant undertakers, nonsuit is proper, there being no evidence of breach of warranty in the sale of the vault.

3. Dead Bodies § 1—

The widow has the primary right to the possession of the body of her deceased husband and to control its burial.

4. Dead Bodies § 2½—

Where an undertaker agrees to conduct a funeral, he impliedly covenants to perform the services contemplated in a good and workmanlike manner.

5. Same—

Where plaintiff alleges that defendants contracted to conduct the funeral of her husband, and that at the time of interment the top of the vault was not locked to the bottom, so that water and mud entered the vault and forced its top to the surface, the action is for breach of contract, and further allegations that such failure was negligent and careless does not convert it into an action in tort.

6. Contracts § 25a—

Damages recoverable for breach of contract are those which are the direct, natural and proximate result of the breach and which, in the ordinary course of events, could have been reasonably foreseen by the parties at the time of the execution of the contract.

7. Same—

In commercial contracts, mental anguish and suffering by reason of the breach thereof are ordinarily not recoverable, since they are deemed too remote to have been in the contemplation of the parties at the time of its execution.

8. Same—

Where a contract is personal and so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the

duty is owed, that mental anguish can reasonably be anticipated as a result of its breach, compensatory damages for mental suffering may be recovered.

9. Dead Bodies § 2½—

Where a widow alleges breach of contract by defendants to conduct the funeral of her husband in failing to lock the top of the vault to its base so that water and mud seeped into the vault and forced its top to the surface, causing her shock which injured her health when she viewed the scene, compensatory damages for such suffering may be recovered.

10. Contracts § 25a—

Where the breach of a personal contract results in shock or fright which impairs plaintiff's health, there is a physical injury entitling plaintiff to compensatory damages regardless of whether the breach amounted to a willful or independent tort.

11. Dead Bodies § 2½—

This action was instituted against undertakers for breach of contract to conduct the funeral of plaintiff's husband, plaintiff alleging that the top of the vault was not locked to its base at the time of interment so that water and mud seeped into the vault. Defendants' evidence was to the effect that they were without authority to make actual interments under the rules and regulations of the cemetery authorities, but that the interments were made exclusively by the cemetery authorities. *Held:* Defendants' evidence raised matters of defense for the consideration of the jury and does not compel judgment of nonsuit.

SEAWELL, J., dissenting.

APPEAL by plaintiff from *Morris, J.*, February Term, 1949, WILSON. New trial.

Civil action bottomed on two alleged causes of action: (1) for damages for breach of contract to conduct the funeral and inter the body of plaintiff's deceased husband, and (2) for damages for breach of warranty in the sale of a vault.

Plaintiff's first husband, Larry Waddell, died 3 August, 1946. She employed the defendant undertakers to conduct the funeral and purchased from them a casket and vault. The vault was composed of two sections: a base on which the casket rested and a metal cover or lid which fitted over the casket and locked to the base with ratchet locks at each end. The defendants represented and warranted that it was watertight and would protect the body from water for years.

On Wednesday before Thanksgiving Day, plaintiff discovered that the vault, during a very rainy spell of weather, had risen above the level of the ground, the top of one end being about six inches above the ground level. She reported the condition to defendants and to the cemetery authorities. Defendants (or the cemetery authorities) undertook to reinter the body.

On the following Saturday, employees of defendant and of the cemetery authorities met at the grave for the purpose of placing the vault in an adjoining grave prepared for that purpose. Plaintiff was present. When the vault, including the base, was raised, it was discovered that water and mud had entered it, and the casket was wet.

The plaintiff offered evidence tending to show that the vault was not locked and had not been locked at the time of the original interment. The defendants contended and offered evidence tending to show that the vault was securely locked, that to remove the vault from the original grave it was necessary to use a lever to prize it out, that the lever slipped, struck the top or lid, and dislodged the locks at one end, permitting the water and mud to enter at that time.

Plaintiff testified that "seeing the vault out of the ground that first time" caused her considerable shock and made her extremely nervous as a result of which she became a nervous wreck. She also testified that while the men were about the grave after a discussion about getting the mud out of the vault, defendant Shingleton said he was not going to get it out and "To hell with the whole damned business, it's no concern of mine," and that this language made her so nervous she could hardly stand up.

The defendants offered evidence tending to show that under the rules of the cemetery association they were forbidden to inter the body or to remove the vault and that the original interment and the reinterment were made by the cemetery authorities.

When the plaintiff rested, the court dismissed the cause of action for damages for breach of warranty but overruled the motion to dismiss the action for breach of contract to inter. At the conclusion of all the evidence, the court again denied the motion to dismiss the action and submitted issues to the jury. The first issue, to wit, "1. Did the defendants by their unlawful, willful negligence and carelessness in the burial of the body of the husband of the plaintiff cause plaintiff to suffer injury and damages, as alleged?", was answered "no." From judgment that plaintiff take nothing she appealed.

Sharpe & Pittman, Connor, Gardner & Connor, and Robert A. Farris for plaintiff appellant.

Lucas & Rand and Z. Hardy Rose for defendant appellees.

BARNHILL, J. All the testimony offered by plaintiff tends to show that water and mud entered the vault by reason of the fact the top was not locked to the base at one end at the time of the original interment. She offered no testimony tending to prove that it was not waterproof as represented by defendants.

It is true the evidence offered by defendants is to the effect the vault was securely locked. On this record, however, that testimony is not available to plaintiff on the cause of action for breach of warranty and may not be considered on the question of nonsuit of that cause of action. At the time it was offered, judgment of nonsuit had been directed, and so that cause was not pending and at issue. As the nonsuit was entered when plaintiff rested, the correctness of the ruling of the court below is to be determined by a consideration of her evidence only. As she offered no proof that the vault was not waterproof when properly locked to the base, the ruling must be sustained.

Indeed, plaintiff's primary cause of action is grounded on the theory that the vault was not locked at one end. On this record the base of the vault was not dislodged and did not rise. Only one end of the top was forced up by water which entered at the unlocked end. This and the condition thereby produced, as alleged by her, is the basis of her claim to damages for breach of contract of burial.

The first issue submitted required the jury to find that plaintiff's alleged injuries resulted from the "unlawful, willful negligence and carelessness" of defendants. The charge of the court on this issue was to like effect. In the submission of the issue and in the charge thereon there was error.

On the death of a husband, the primary right to possession of the body and to control of burial is in the widow. 15 A.J. 839, 847; Anno. L.R.A. 1915B 519. She may maintain an action for mutilation of the body. *Stephenson v. Duke University*, 202 N.C. 624, 163 S.E. 698; *Morrow v. Cline*, 211 N.C. 254, 189 S.E. 885; *Morrow v. R. R.*, 213 N.C. 127, 195 S.E. 383; *Gurganious v. Simpson*, 213 N.C. 613, 197 S.E. 163. But here no mutilation is alleged.

This is essentially an action for damages for breach of contract. Plaintiff alleges a contract to furnish a casket and watertight vault and conduct the funeral and inter the body, the breach thereof by failure to lock the vault, and damages resulting from the breach. The further allegation that the defendants' failure to lock the vault at the time of the burial, as a result of which water and mud entered the vault and forced its top to the surface, was due to their negligence and carelessness does not convert it into an action in tort.

The defendants held themselves out as specially qualified to perform the duties of an undertaker. When they undertook to conduct the funeral of plaintiff's deceased husband they impliedly covenanted to perform the services contemplated by the contract in a good and workmanlike manner. Any breach of the duty thus assumed was a breach of the duty imposed by the contract and not by law.

So then, the primary question posed for decision is this: Is mental anguish an element of damages to be considered by the jury in an action for the breach of the contract alleged and, if so, must plaintiff show that the breach amounted to a willful tort?

"A party to a contract who is injured by another's breach of the contract is entitled to recover from the latter damages for all injuries and only such injuries as are the direct, natural, and proximate result of the breach or which, in the ordinary course of events, would likely result from a breach and can reasonably be said to have been foreseen, contemplated, or expected by the parties at the time when they made the contract as a probable or natural result of a breach . . ." 15 A.J. 449, sec. 51; 25 C.J.S. 441, sec. 24; *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277; *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592; *Chesson v. Container Co.,* 216 N.C. 337, 4 S.E. 2d 886; *Monger v. Lutterloh,* 195 N.C. 274, 142 S.E. 12.

Even so, contracts are usually commercial in nature and relate to property or to services to be rendered in connection with business or professional operations. Pecuniary interest is dominant. Therefore, as a general rule, damages for mental anguish suffered by reason of the breach thereof are not recoverable. Some type of mental anguish, anxiety, or distress is apt to result from the breach of any contract which causes pecuniary loss. Yet damages therefor are deemed to be too remote to have been in the contemplation of the parties at the time the contract was entered into to be considered as an element of compensatory damages. McCormick on Damages 592, sec. 145; 15 A.J. 599, sec. 182; Anno. 23 A.L.R. 372, 44 A.L.R. 428, 56 A.L.R. 659.

The rule is not absolute. Indeed, the trend of modern decisions tends to leave it in a state of flux. Some courts qualify the rule by holding that such damages are recoverable when the breach amounts in substance to a willful or independent tort or is accompanied by physical injury. 15 A.J. 599, 603; *Hall v. Jackson,* 134 P. 151. Still others treat the breach as an act of negligence and decide the question as though the action were cast in tort, and thus confuse the issue. Thus, to some extent the courts have modified the common law rule.

In this process of modification a definite exception to the doctrine has developed. Where the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach, compensatory damages therefor may be recovered. 15 A.J. 600; McCormick on Damages 592; *Warner v. Allen,* 34 A.L.R. 1348. In such case the

party sought to be charged is presumed to have contracted with reference to the payment of damages of that character in the event such damages should accrue on account of his breach of the contract. *Renihan v. Wright,* 25 N.E. 822 (Ind.); McCormick on Damages 595.

Thus we have held that such damages may be recovered in an action for breach of contract of marriage, *Allen v. Baker,* 86 N.C. 91, 41 Am. Rep. 444; Anno. 41 L.R.A. ns 842, and for breach of contract to transmit a death message, *Russ v. Telegraph Co.,* 222 N.C. 504, 23 S.E. 2d 681; *Johnson v. Telegraph Co.,* 175 N.C. 588, 96 S.E. 36; *Betts v. Telegraph Co.,* 167 N.C. 75, 83 S.E. 164, when the meaning or import of the message and the interest of the addressee or beneficiary of the contract is made known to the telegraph company at the time the message is accepted for transmittal. *Thomason v. Hackney,* 159 N.C. 299, 74 S.E. 1022.

The tenderest feelings of the human heart center around the remains of the dead. When the defendants contracted with plaintiff to inter the body of her deceased husband in a workmanlike manner they did so with the knowledge that she was the widow and would naturally and probably suffer mental anguish if they failed to fulfill their contractual obligation in the manner here charged. The contract was predominantly personal in nature and no substantial pecuniary loss would follow its breach. Her mental concern, her sensibilities, and her solicitude were the prime considerations for the contract, and the contract itself was such as to put the defendants on notice that a failure on their part to inter the body properly would probably produce mental suffering on her part. It cannot be said, therefore, that such damages were not within the contemplation of the parties at the time the contract was made. *Wright v. Beardsley,* 89 P. 172; *Renihan v. Wright, supra; Burrus v. Ry.,* 145 P. 926; *Fitzsimmons v. Olinger Mortuary Ass'n.,* 17 P. 2d 535; *Hall v. Jackson, supra; Brown Funeral Homes v. Baughn,* 148 So. 154; *Loy v. Reid,* 65 So. 855; *Dunn v. Smith,* 74 S.W. 576; McCormick on Damages 592, sec. 145; 15 A.J. 601.

On this record the "willful and intentional tort" doctrine, even if we should be disposed to adopt it in a proper case, does not apply here so as to bar recovery for the reason that, with us, impairment of health proximately resulting from a state of nervousness, produced by shock and fright, constitutes a physical injury. *Kimberly v. Howland,* 143 N.C. 398; *Kirby v. Stores Corp.,* 210 N.C. 808, 188 S.E. 625; *Sparks v. Products Corp.,* 212 N.C. 211, 193 S.E. 31.

The defendants offered evidence tending to show that the cemetery in which the interment was made is the property of the City of Wilson and that under the rules and regulations of the cemetery authorities interments are made exclusively by agents or employees of the city; that while undertakers conduct funerals they are not permitted to and do not make

the actual interment; that they lower the casket or vault into the open grave and leave the rest to the municipal authorities as they are required to do. These are matters in defense which, on proper evidence thereof, must be considered by the jury. In the light of plaintiff's testimony, they do not compel judgment of nonsuit.

The court below erred in submitting the quoted issue and in its charge thereon. It is therefore necessary that the cause be remanded for trial upon the issues raised by the pleadings. It is so ordered.

New trial.

SEAWELL, J., dissenting: I think the case should be sent back for retrial but not with the restrictions and limitations on plaintiff's cause of action which I find *in ratione decidendi* of the main opinion.

I think the vault used in the burial undertaken by the defendants should be regarded as an accessory to the burial contracted for and undertaken by defendants and not as a separate sales transaction in which the contract, with its warranty, might be performed by delivery in its unassembled state.

The defendants are not relieved from liability by reason of the fact that plaintiff did not show that the vault was not watertight when properly locked.

The contract was one of burial in which the defendants undertook to bury the body of plaintiff's husband in this particular vault. Its potentialities as a watertight vault were useless and unavailable for the purpose for which the vault was intended until the top was locked to the base. The nature of the contract, and plaintiff's evidence put this duty on the defendants and they failed to discharge it. By reason of that fact water and mud soaked the body and plaintiff is entitled to recovery for the breach of the contract, made specifically to prevent that occurrence, and the consequent and ensuing mental suffering, if the jury should so find.

The gravamen of the plaintiff's action does not rest in a claim that the burial was not done in a workmanlike manner,—that is entirely too narrow;—it lies in the breach of the specific contract to bury her husband's body in a watertight vault, selected for the purpose; *a vault watertight at the time of the burial,* by proper assembly of its parts, by locking of the top to the base, if necessary to make it perform the intended function,—and it was. This has nothing to do with the way defendants "held themselves out as specially qualified to perform the duties of an undertaker" or the corollary statement in the opinion of the Court: "When defendants undertook to conduct the funeral of plaintiff's deceased husband they impliedly covenanted to perform the services contemplated by the contract in a good and workmanlike manner." That exists, of course,

but it cannot be used to exclude the specific obligation of the contract, to wit: To bury the body in a specific way, in a watertight vault. Yet, of this, in discussing the nonsuit, the Court, in its opinion, observes: "As she offered no proof that the vault was not waterproof when properly locked to the base the ruling must be sustained." Thus plaintiff's main cause of action is dismissed by nonsuit, and another, upon which she did not declare, and in which there are plenty of hurdles, is handed to her for prosecution. I question,—not the power of the Court, of course—but the propriety of that action.

STATE v. BENNIE DANIELS AND LLOYD RAY DANIELS.

(Filed 2 November, 1949.)

1. **Criminal Law § 73a—**

It is the sole responsibility of defendant's counsel to make out and serve statement of case on appeal within the time allowed and they are charged with knowledge of the procedure to be followed and with knowledge of the necessity of filing same within the time prescribed and the consequences of failure to do so.

2. **Same—**

Service of statement of case on appeal may be made by a proper officer by leaving a copy thereof in the office of the solicitor, G.S. 1-282. The Supreme Court will take judicial notice that a solicitor is perforce absent from his office much of the time in the prosecution of the docket in the various counties of his district, hence the liberal method of service permitted under the statute.

3. **Same—**

The rules relating to the time of service of statement of case on appeal are mandatory and not directive.

4. **Criminal Law § 76a—**

Where, upon defendants' petition for *certiorari*, it does not appear that delay of the court reporter or the voluminousness of the record presented insurmountable difficulties to serving case on appeal within the time allowed, but to the contrary, that case on appeal was ready for service within the time allowed and could have been served by a proper officer by leaving a copy in the office of the solicitor, defendants' petition for *certiorari* will be denied. The press of other duties upon defendants' counsel will not excuse failure to serve statement of case on appeal in time.

5. **Criminal Law § 57d—**

The common law writ of error *coram nobis* is available to a defendant to challenge the constitutionality of conviction for matters extraneous the record, G.S. 4-1.

6. Same—

Application for permission to apply for a writ of error *coram nobis* must be made to the Supreme Court, where it will be allowed upon a *prima facie* showing of substance, leaving the ultimate merits of the petition for the determination of the trial court, with the right of petitioner to appeal from an adverse ruling. N. C. Constitution, Art. IV, sec. 8.

At May Term, 1949, of the Superior Court of Pitt County, the defendants were tried and convicted of first degree murder, without recommendation of mercy, and were sentenced to death. Judgment was pronounced on June 6, 1949, on which day the court adjourned. The defendants were allowed 60 days from that date in which to make out and serve case on appeal, and the State was allowed 30 days thereafter to serve countercase or exceptions.

The defendants did not serve their case within the time allowed; but on August 6 left a copy thereof at the office of the Solicitor of the district. No extension or waiver of time to serve the statement of case on appeal other than that contained in the appeal entries was made, and none was requested. The Solicitor, however, served amendments and exceptions to the defendants' statement and caused the same to be served on an attorney for the defendants, making, however, the following reservations:

"The undersigned Solicitor of the Fifth Judicial District, not waiving any rights, and specifically reserving and now reasserting exception by the State to the failure of the defendants to serve Statement of Case on Appeal within the time fixed by the Court, and renewing its motion to strike the said Statement of Case on Appeal from the record, objects to the Statement of Case on Appeal as left at the Solicitor's office and offers the following exceptions or amendments thereto."

The Solicitor filed a written motion to strike out the statement of case on appeal for failure of defendants to make up and serve the same within the time fixed by the court, serving notice of the motion on Herman L. Taylor, attorney for the defendants.

On the hearing defendants' attorney admitted that the statement of case on appeal was left in the Solicitor's office with his secretary on August 6, 1949, and that the attempted service was not within the 60 days fixed by the court. G.S. 1-282.

At the hearing, October 1, 1949, Judge Williams, finding these facts, allowed the motion and struck out defendants' statement of case on appeal.

The defendants have filed in this Court two petitions for *certiorari:* One on September 27, 1949, before the order of Judge Williams above recited; the other on October 10, 1949, after that event. Both are of the same import, and they may be considered here as one petition. For

convenience, any reference to the "petition" will be understood as implying both. The petitions are as follows:

"Bennie Daniels and Lloyd Ray Daniels, petitioners, respectfully show unto the court:

"1. That at the March, 1949 Term of the Superior Court of Pitt County, North Carolina, that petitioners were indicted for the crime of first-degree murder.

"2. That at the May 30, 1949 Term of said court petitioners were tried upon said bill of indictment and convicted of the capital crime of first-degree murder without recommendation of mercy.

"3. That from the judgment of death pronounced by His Honor Clawson L. Williams, Judge Presiding, petitioners, with the allowance of the Court appealed *in forma pauperis* to the Supreme Court of North Carolina.

"4. That the said May 30, 1949 term of the said court, at which petitioners were tried and convicted, was duly convened on the said 30th day of May, 1949, and the judgment of the Court was pronounced on June 6, 1949.

"5. That the defendants were allowed sixty (60) days from the date of the judgment in which to make out and serve case on appeal upon the Solicitor of the Fifth Judicial District, and the Solicitor was allowed thirty (30) days after such service to serve counter-case, or exceptions thereto.

"6. That some forty-five (45) or fifty (50) days elapsed before the court reporter attendant upon the said May 30, 1949 Term of the aforesaid court, at which petitioners were tried and convicted, due to her attendance at and upon other courts, delivered into the hands of the attorneys for petitioners the full and complete record of the proceedings had in said trial.

"7. That the record in the cause covers some four (4) volumes, consisting of some five or six hundred pages.

"8. That counsel for petitioners, with all of the diligent efforts they could bring to bear, being under the pressure of other cases, both before this Court and pending in other inferior courts, as well as being retarded in the effort by the lateness of receipt of the complete record in the cause from the Court Stenographer, as aforementioned, served statement of case on appeal upon the Solicitor on the 6th day of August, 1949; that within thirty (30) days thereafter, the Solicitor filed some 132 exceptions to the case on appeal in addition to a motion to strike same; that because of the filing of said exceptions and motion, it will be necessary for counsel for defendants and the Solicitor to meet with the Presiding Judge for a ruling on

said exceptions and motion; that the aforementioned hearing will carry the settlement in this cause well beyond the date on which, under the rules of this Court, said cause should be docketed.

"9. That cases from the Fifth Judicial District must be docketed in this Court on Tuesday, September 27, 1949.

"10. That the inability to docket said cause within the time prescribed is not due to any lack of diligence or good faith on the part of any of the parties herein involved, but to the reasons previously set out.

"11. That petitioner has caused to be docketed in the office of the Clerk of the Supreme Court of North Carolina contemporaneously with the filing of this petition the record prepared in this case as the same appears on the record in the office of the Clerk of Superior Court of Pitt County, North Carolina, properly certified to by said clerk.

"12. That petitioner has a meritorious appeal, based upon prejudicial errors committed by the Court during the course of his trial, in particular, (1) in denying petitioner's motion challenging the array of petit jurors, timely lodged, upon the ground of systematic discrimination against, and disproportionate representation of, Negroes in the selection of petit juries and jurors in Pitt County, solely and wholly on the basis of race or color, your petitioner being of the Negro race; and (2) in admitting into evidence, over petitioners' objection, confessions which the record shows were extorted through fear and were involuntarily made.

"WHEREFORE, petitioners pray that in order that they may be protected, the Court issue to the Clerk of the Superior Court of Pitt County, North Carolina, a writ of *certiorari*, to the end that the record and the case on appeal in its entirety be certified to the Supreme Court of North Carolina, and that this cause be docketed and set by the Court for hearing at the end of the call of the calendar for the hearing of appeals from some other Judicial District other than the Fifth Judicial District."

"Now come Bennie Daniels and Lloyd Ray Daniels, petitioners, through their attorneys, Herman L. Taylor and C. J. Gates, and respectfully show unto the Court:

"1. That on the 27th day of September, 1949, petitioners filed in this Court a petition for writ of *certiorari*, praying the Court that they be allowed to docket the appeal which they duly noted at the May 30, 1949 term of the Superior Court of Pitt County, from a judgment and sentence of death for first-degree murder, at a time other than that set for the docketing of appeals from the Fifth Judicial District, upon the ground that as the case on appeal in their

cause had not been settled, they could not docket said case as required by the rules of this Court.

"2. That in the said petition for *certiorari,* petitioners set out in paragraph eight thereof that an additional factor which precluded the timely docketing of their appeal was the filing by the Solicitor of a motion to strike the statement of case on appeal, in addition to numerous exceptions thereto, the hearing on which was set for a time subsequent to the day on which this appeal should have been docketed under rules of this Court.

"3. That on Thursday, September 29, 1949, a hearing was held in the Superior Court of Lenoir County before the Honorable Clawson J. Williams, Judge, who presided over the trial of this cause, on the motion of the Solicitor to strike defendants' statement of case on appeal, for that the same was not served within the time set by the order of the court, entered on the day the appeal was noted, but was one day late, to wit, defendants had sixty days from June 6th in which to prepare and serve case on appeal, and said service was attempted on August 6th.

"4. That His Honor Clawson L. Williams, on the last day of October, 1949, issued an order allowing the motion of the Solicitor to strike defendants' statement of case on appeal and ordered same to be stricken.

"5. That a detailed affidavit of one of counsel for defendants, attached hereto and prayed to be made a part hereof, sets out that personal service of the statement of case on appeal was not had and could not be had on the Solicitor of the Fifth Judicial District on the day on which time for serving case on appeal expired, for that the said Solicitor was neither in his office nor at home, but was out of town and was not expected back before three days after the deadline for serving case on appeal; that counsel for defendants did not know of the whereabouts of the Solicitor or how to contact him with respect to serving case on appeal.

"6. That defendants' failure to perfect their appeal, as set out in the affidavit of counsel, was not and is not due to any laches on the part of them or their counsel.

"7. That the trial Judge having allowed the striking of defendants' statement of case on appeal, petitioners have no other remedy whereby their cause may be brought before this Court except by the granting of the writ herein prayed for.

"8. That as specifically pointed out in the petition filed in this Court on the 27th day of September, 1949, to which this petition is a supplement, petitioners have a meritorious appeal, based upon

prejudicial errors committed by the court during the trial of their cause.

"WHEREFORE, petitioners pray the Court that in order that they may be fully protected in their life and limbs that the writ herein prayed for be allowed and that they be given leave to bring their said cause before this Court upon *certiorari.*

"This 10th day of October, 1949."

A supporting affidavit of Herman L. Taylor, attorney for the defendants, is as follows:

"Herman L. Taylor, being first duly sworn, deposes and says: that he is a practicing attorney in the courts of the State of North Carolina; that he is one of the counsel of record for the defendants in the above entitled matter; that as such he has been in charge of the preparation of defendants' case on appeal, in particular, the preparation and service of statement of case on appeal in the above entitled matter;

"That on the 6th day of June, 1949, a judgment of death by asphyxiation was rendered against the defendants, upon a verdict of guilty of first-degree murder; that from said judgment defendants noted an appeal to this Court and were allowed sixty (60) days in which to make out and serve statement of case on appeal upon the solicitor of the Fifth Judicial District; that some fifty (50) or fifty-one (51) days, out of the sixty (60) days allowed defendants in which to prepare statement of case on appeal, passed before counsel for defendants received the full and complete record in this cause; that the record in this cause comprises some four volumes, consisting of some 500 or more pages; that approximately one month passed before counsel for defendants received even the first volume of said record, consisting of some 300 or more pages, as is evidenced by a letter of the stenographer attendant upon the term of court at which defendants were convicted and sentenced, a copy of which letter is hereto attached;

"That despite the delay in receipt of the record in this cause, counsel for defendants made all diligent efforts to prepare statement of case on appeal within the time prescribed by the order of the court; that although the last volume of the record on appeal was received only about one week prior to the expiration of the time for service of statement of case on appeal, counsel for defendants, by the exertion of diligent and painstaking efforts, completed preparation of the said statement of case on appeal in the afternoon of Thursday, August 4th, one day prior to the deadline; that on the morning of Friday, August 5, 1949, the last day on which service of statement

of case on appeal could have been made, under the order of the court setting time for service of statement of case on appeal, he, Herman L. Taylor, telephoned the office of the Honorable William J. Bundy, Solicitor, in Greenville, North Carolina, from Fayetteville, North Carolina, where he was engaged in another matter, attempting to contact him with respect to service of case on appeal in this matter; that upon being told by the telephone operator that the Solicitor was not in his office, he talked to Mrs. M. W. Fields, secretary in the office of the Solicitor; that the said Mrs. M. W. Fields stated to him that the Solicitor was not in his office, was not at home, that he was out of town and could not be reached until he returned to his office on Monday morning, August 8th; that in default of being able to contact the Solicitor in person, on Saturday morning, August 6th, he left a copy of the statement of case on appeal at the office of the Solicitor with his secretary and received in return a signed statement of acceptance of said statement of case on appeal by the said Mrs. M. W. Fields, on behalf of the Solicitor, a copy of which acceptance is attached hereto;

"That at the hearing before His Honor Clawson L. Williams, held by agreement, in Kinston, North Carolina, on Thursday, September 29th, the Honorable Solicitor admitted that he had forgotten that service of statement of case on appeal in the above entitled matter was due to be made during the week of August 1st, and further admitted that he and his family were at a beach on the morning of Friday, August 5th, when counsel for defendants attempted to contact him by telephone and that he did not return to Greenville until Sunday evening, August 7th, and to his office until Monday, August 8th."

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Herman L. Taylor and C. J. Gates for defendants, petitioners.

SEAWELL, J. The fact that the defendants, convicted of a capital offense, have been, since the pronouncement of judgment, under sentence of death should inspire in all persons concerned in the further administration of justice the most careful attention to the duties resting upon them. But especially it should admonish those upon whom, by reason of their special relation to the defendants as attorneys, and who are also officers of the court, to exercise the utmost diligence in the performance of those duties, which are essential to appellate review, the making out and serving within the allotted time defendants' case on appeal, for which they are solely responsible. As practicing lawyers they are presumed to know this

necessity and the consequence of inattention or failure; and they are charged with the knowledge of the procedure to be followed.

The affidavit of the attorney now pressing for *certiorari* pleads, as excusing the delay, a great press of business in the courts and elsewhere on other matters; that the stenographer's transcript of the trial contained 500 pages or more; that only the first volume, containing 365 pages, was received near the end of the first month; and the final 150 pages, more or less, was received a week before the time allotted for service expired. He adds that, by great diligence, the case on appeal had been completed and was ready for service on the afternoon of the last day of the period during which legal service could be made. The attorney then undertook to locate the Solicitor for the purpose of making personal service on him, and on being informed that he was not in his office went no further in his attempted service until the time had expired. He then attempted service by leaving a copy of the statement of the case on appeal at the office of the Solicitor. That method of service is authorized by the statute and would have been good if made in time by a proper officer. *Cummings v. Hoffman,* 113 N.C. 267, 18 S.E. 170; *Roberts v. Partridge,* 118 N.C. 355, 24 S.E. 15; *McNeill v. Raleigh, etc., Ry. Co.,* 117 N.C. 642, 23 S.E. 268.

The attorneys for petitioners were not impeded or delayed by the absence of the Solicitor. The Court will take judicial notice of the fact that he is absent from his office much of the time in prosecution of the docket in various counties of his district, hence the liberal method of service prescribed by the statute.

What pressing duties the attorneys may have had in other matters, and other places, and the priority given them we need not inquire; but we can think of nothing more important and more pressing at this time than attention to the clients' appeal.

As to the voluminous character of the record, and the manner of dealing with it, we do not think that it presented an insurmountable obstacle to timely service, or one which the diligence demanded of the attorneys might not have overcome; or that service in the manner required by law might not have been made after the case admittedly was complete.

Rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive. *S. v. Moore,* 210 N.C. 686, 188 S.E. 421; *S. v. Lampkin,* 227 N.C. 620, 44 S.E. 2d 30; *S. v. Nash,* 226 N.C. 608, 30 S.E. 2d 596; *S. v. Watson,* 208 N.C. 70, 179 S.E. 455.

The petitioners aver that they have a meritorious defense. The Court is interested in that, of course. But the merit which excuses nonperformance of the specific duty under discussion does not lie in the soundness of the exceptions taken on the trial, but rather in the circumstances which render performance impossible or impractical.

The petition must be denied.

The gravamen of the present challenge to the validity of the trial is found in the two objections referred to in the petition: The alleged systematic exclusion of members of the Negro race from the jury lists of Pitt County and the consequent absence of Negroes from the panel which tried them; the admission in evidence of confessions of guilt by the accused which confessions they contend were not voluntary but were procured by illegal means.

Both these objections involve questions of invasion of constitutional rights which, in the instant case, can be presented only through matter extraneous to the record. Ordinarily in this situation resort may be had to writs of error *coram nobis*.

The common law writ of error *coram nobis* has been recognized and used in this State in similar situations from early times and is in common use elsewhere. Its authority here is referred to the statute G.S. 4-1, which adopts the common law as the law of this State when not modified,—with exceptions not applicable to this case,—and to the State Constitution, Article IV, Section 8, which gives this Court authority to exercise supervision over the inferior courts of the State. Authority for the writ, its nature and limitations, occasion for its exercise and relevant procedure are dealt with in the following cases and authorities: *In re Taylor,* 230 N.C. 566; *In re Taylor,* 229 N.C. 297, 49 S.E. 2d 749; *Roughton v. Brown,* 53 N.C. 393; *Lassiter v. Harper,* 32 N.C. 392; *Tyler v. Morris,* 20 N.C. 625; *Berry v. State,* 22 Ind. 294, 173 N.E. 705, 72 A.L.R. 117; 3 Am. Jur., p. 766, sec. 1276; see also, *Hysler v. Fla.,* 315 U.S. 411; *Taylor v. Ala.,* 335 U.S. 252, 92 L. Ed. 1935, (anno., p. 1936). The writ of error *coram nobis* can only be granted in the court where the judgment was rendered. *Ernst. v. State,* 179 Wis. 646, 192 N.W. 65, 30 A.L.R. 681, headnote 5; *Roughton v. Brown, supra;* 3 Am. Jur., *supra,* sec. 1276.

Since here the authority for the writ stems from the supervisory power given the Supreme Court in the section of the Constitution cited, it is necessary that an application be made to this Court for permission to apply for the writ to the Superior Court in which the case was tried. *In re Taylor (supra),* 230 N.C. 566, 569. It is granted here only upon a "*prima facie* showing of substantiality," and it is observed in the *Taylor case* last cited, "The ultimate merits of the petitioner's claim are not for us but for the trial court."

On consideration in the trial court, if the decision is adverse to the petitioners, the court will find the facts, and an appeal to this Court will lie as in other cases.

A full consideration of the nature and limitations of the writ and relevant procedure may be found in *In re Taylor,* 230 N.C. 566, and *In re Taylor,* 229 N.C. 297, both *supra.*

The space given to this somewhat incidental discussion is justified, we think, by the desire to make it clear to the petitioners that the writ of error *coram nobis* is available to them only if they can bring themselves within the purview of such a writ.

The petition for *certiorari* is denied.

NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM, AND W. L. TOTTEN, ASSIGNEE, v. R. E. BLAND AND WIFE, LOUISA BLAND, AND F. B. BLAND.

(Filed 2 November, 1949.)

1. Waiver § 2—

A waiver is simply an intentional relinquishment of a known right.

2. Homestead § 8—

A written request by judgment debtors to the sheriff to sell lands under execution without the allotment of homestead to the end that the property might bring the highest price possible, and the joinder of the judgment debtors in the sheriff's deed to the purchaser, constitute an authorization and ratification of the act of the sheriff in making the execution sale without allotment of homestead and is a valid waiver by the judgment debtors of their homestead exemption in regard to that particular execution.

3. Same—

Homestead is a right created for the benefit of the judgment debtor, and therefore other judgment creditors cannot complain of a waiver by the debtor of this right in designated realty as to a particular judgment. N. C. Constitution, Art. X, sec. 2.

4. Execution § 16—

Where the judgment debtor waives his homestead in specific realty as to a particular judgment, the sheriff may sell the lands under execution without allotting homestead.

5. Same—

Where it is not made to appear that the judgment debtors possessed personalty, attack of the sale on the ground that the sheriff failed to satisfy the judgment out of the personalty is untenable, since it will be presumed that the sheriff levied on realty because he could not find any personalty. G.S. 1-313 (1).

6. Same: Execution § 23½—

The requirement that the personalty of the judgment debtor be first exhausted before sale of his realty under execution is for the benefit of the judgment debtor and other judgment creditors may not attack the execution sale on the ground that this was not done.

7. Execution § 16—

A judgment debtor waives his right to have his personalty first exhausted before sale of his realty under execution by requesting the sheriff to levy upon the realty, or by failing to disclose his personalty when the sheriff is about to make a levy.

8. Same—

Upon the expiration of ten days after the sale during which the sale is held open for receipt of an advance bid, the right of the purchaser to deed becomes absolute, and when this right vests within ninety days after the issuance of execution the validity of the sale is not affected by delay of the sheriff in making formal return or in executing deed to the purchaser. G.S. 45-28, G.S. 1-310.

9. Execution § 22—

The sheriff's deed to the purchaser at an execution sale relates back to the sale and operates to pass title as of that time.

10. Deeds § 2a (1)—

Where the owners of land join in as grantors in the sheriff's deed to the purchaser at execution sale, the deed passes their title to the purchaser independently of any acts or participation by the sheriff under the execution sale, subject to the lien of any other judgments against them.

11. Judgments § 23—

Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of ten years from the date of the rendition of the judgment and not the date of docketing. G.S. 1-234, G.S. 1-306.

12. Same: Judgments § 22a—

An action on a judgment does not extend the lien of the original judgment and the new judgment does not become a lien on the realty until docketed in the county wherein the land is situate, and therefore where the judgment debtors have conveyed the property prior to the docketing of the new judgment, their grantees take the land free from the lien of the original judgment after the expiration of ten years from the date the original judgment was rendered.

APPEAL by plaintiff, W. L. Totten, from *Frizzelle, J.*, at the June Term, 1949, of LENOIR.

The facts resulting in this litigation have been established by the written stipulation of the parties. They are summarized below.

1. On 8 March, 1927, the Superior Court of Lenoir County entered judgment in favor of Jesse Wallace and against R. E. Bland and his wife, Louisa Bland, for $3,843.75 with certain interest and costs. This judgment was immediately docketed on the judgment docket of the court in which it was rendered. On December 19, 1930, it was assigned to F. B. Bland, the son of R. E. Bland and Louisa Bland.

2. On 2 October, 1933, the Superior Court of Durham County rendered judgment in favor of the North Carolina Joint Stock Land Bank of Durham and against R. E. Bland and his wife, Louisa Bland, for $4,124.04 with certain interest and costs. This judgment was docketed on the judgment docket of the Superior Court of Lenoir County on 11 October, 1933. Afterwards, to wit, on 3 November, 1942, this judgment was assigned to W. L. Totten.

3. Meanwhile, to wit, on 10 June, 1936, an execution was issued upon the Jesse Wallace judgment and placed in the hands of the Sheriff of Lenoir County, who forthwith levied the same upon 29 acres of land situated on the Neuse River in Lenoir County and owned by R. E. Bland and his wife, Louisa Bland. This levy was made at the instance of the owners, who requested the Sheriff in writing to sell such land under the execution without any allotment of any homestead to them "to the end that the full value of said lands may be realized at the sale" and who assured the Sheriff in writing that they would join in the Sheriff's deed to the purchaser at the execution sale "to the end that the complete title, including their homestead rights, may be conveyed to the purchaser." Pursuant to this request and assurance, the Sheriff did not cause any homestead to be set apart to the judgment debtors. After an advertisement conforming to G.S. 1-325 and notifying prospective bidders of the terms of the request and assurance of the judgment debtors, the sheriff sold the 29 acres under the execution at public outcry to F. B. Bland, the last and highest bidder, for $1,750.00 in cash at the courthouse door of Lenoir County on the first day of the regular August Term of the Superior Court of Lenoir County, *i.e.*, on Monday, 24 August, 1936. The sale was forthwith reported to the Clerk of the Superior Court of Lenoir County, and was held open for ten days for the receipt of advanced bids. This period expired without the bid being increased.

4. On 3 October, 1936, the Sheriff of Lenoir County and R. E. Bland and his wife, Louisa Bland, as parties of the first part, signed, sealed, acknowledged, and delivered to F. B. Bland, as party of the second part, a deed dated 9 September, 1936, in the form customarily employed by sheriffs making sales of realty under executions. After prefatory recitals of all the details of the execution sale and of the fact that it had been made by the Sheriff without any allotment of homestead pursuant to the written request of the judgment debtors "to the end that the land might be sold for the highest possible price and to the end that the purchaser at said execution sale would acquire a full and complete title to said land freed from all homestead rights of said judgment debtors," the deed acknowledged the receipt of the sale price by the Sheriff and specified that "the parties of the first part" conveyed the 29 acres of land "with all privileges and appurtenances thereunto belonging" to F. B. Bland

"and his legal representatives in as full and ample manner as the said first parties are authorized and empowered to convey the same." On the date of the execution of the deed, *i.e.*, on 3 October, 1936, the Sheriff made formal return to the execution to the Superior Court of Lenoir County, and nine days later, *i.e.*, on 12 October, 1936, the deed was recorded in the office of the Register of Deeds of Lenoir County.

5. The North Carolina Joint Stock Land Bank of Durham and W. L. Totten had no actual knowledge of the execution sale and the ensuing deed until the latter part of the year 1942.

6. On 2 September, 1943, the North Carolina Joint Stock Land Bank of Durham and W. L. Totten sued R. E. Bland and his wife, Louisa Bland, on the judgment of 2 October, 1933, in the Superior Court of Durham County, and on 15 November, 1943, the Superior Court of Durham County rendered judgment in such action in favor of the North Carolina Joint Stock Land Bank and W. L. Totten and against R. E. Bland and his wife, Louisa Bland, for $4,124.04 with certain interest and costs. This judgment was forthwith docketed on the judgment docket of the Superior Court of Lenoir County. On 2 September, 1943, the North Carolina Joint Stock Land Bank of Durham had no interest whatever in the original judgment of 2 October, 1933, upon which the new judgment was entered, and it has no interest in such judgment now.

The stipulation of facts does not reveal whether the judgment debtors possessed any personal property at the time of the levy and sale.

The North Carolina Joint Stock Land Bank of Durham and W. L. Totten brought the present action against R. E. Bland and his wife, Louisa Bland, and F. B. Bland, in the Superior Court of Lenoir County on 31 December, 1943, for the avowed purpose of obtaining a judgment setting aside the execution sale and the ensuing deed to F. B. Bland and ordering a sale of the 29 acres by a commissioner for the satisfaction of "the plaintiffs' judgment."

When the cause was heard upon the facts stipulated by the parties, the court reached the conclusions adverted to in the opinion and rendered judgment that the deed from the Sheriff, and R. E. Bland and Louisa Bland to F. B. Bland "is good and sufficient and conveyed the title to the lands therein described" to F. B. Bland. The plaintiff, W. L. Totten, excepted and appealed, assigning errors.

S. J. Bennett and R. M. Gantt for the plaintiff, W. L. Totten, appellant.

Allen, Allen & LaRoque and John G. Dawson for the defendants, appellees.

ERVIN, J. The first objection of appellant to the judgment is founded on the theory that the execution sale and the ensuing deed are void because "the Sheriff failed to allot the homestead to R. E. Bland and his wife, Louisa Bland." This assumption rests, in turn, upon these three successive and diverse hypotheses: (1) That the acts of the judgment debtors were insufficient in form to waive their homestead rights in the land embraced by the deed; (2) that the judgment debtors were incapacitated by law to waive such rights in the land even if their acts were adequate in form to effect such purpose; and (3) that in any event it was obligatory for the Sheriff to cause a homestead to be set apart to the judgment debtors in the land in question as a condition precedent to a valid execution sale of any part of such land.

The first of these presuppositions is clearly not maintainable. A waiver is simply an intentional relinquishment of a known right. *In re Will of Yelverton,* 198 N.C. 746, 153 S.E. 319; *Aldridge v. Insurance Company,* 194 N.C. 683, 140 S.E. 706. By their previous writing and their subsequent deed, R. E. Bland and Louisa Bland expressly authorized and specifically ratified the act of the Sheriff in making the execution sale of their land without the allotment of any homestead "to the end that the land might be sold for the highest possible price and to the end that the purchaser at said execution sale would acquire a full and complete title to said land, freed from all homestead rights of said judgment debtors." They could not have chosen a more unequivocal and efficacious way of manifesting their deliberate intention to forego their homestead rights in the property in controversy.

The second and third hypotheses of the appellant on the present phase of the case necessarily arise out of the idea that the right to a homestead exemption is intended to advantage the judgment creditor. This notion is fallacious. The right is created for the benefit of the judgment debtor, and belongs to him. N. C. Const., Art. X, sec. 2; *Joyner v. Sugg,* 132 N.C. 580, 44 S.E. 122. This being so, a judgment debtor, who possesses legal competency, may waive his homestead rights in specific realty as to a particular judgment. *Cameron v. McDonald,* 216 N.C. 712, 6 S.E. 2d 497; *Pence v. Price,* 211 N.C. 707, 192 S.E. 99; *Sugg v. Pollard,* 184 N.C. 494, 115 S.E. 153; *Simmons v. McCullin,* 163 N.C. 409, 79 S.E. 625, Ann. Cas. 1915 B, 244. When a judgment debtor does that, the Sheriff may sell the land under an execution issued upon the particular judgment without causing any homestead to be set apart for the judgment debtor, and the sale is effectual against the judgment debtor and the owners of judgments docketed against the judgment debtor subsequent to the docketing of the particular judgment. *Sugg v. Pollard, supra; Simmons v. McCullin, supra.*

The second objection of appellant to the judgment is based on the contention that the execution sale and the ensuing deed are void because the Sheriff did not exhaust the personalty of the judgment debtors before taking their realty for the satisfaction of the judgment.

The execution in the case at bar conformed strictly to G.S. 1-313 (1), which prescribes that an execution against the property of a judgment debtor shall require the Sheriff "to satisfy the judgment out of his personal property, and if sufficient personal property cannot be found out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter."

Divers reasons render appellant's second objection to the judgment untenable. Manifestly, the statute can apply only in case the judgment debtor owns both personal and real property. Since the stipulation of the parties as to the facts does not disclose that the judgment debtors possessed any personalty when the realty was levied upon and sold, it must be presumed that the Sheriff performed his duty and levied on the land because he could not find any personal property. *Knox v. Randall,* 24 Minn. 479; *Godman v. Boggs,* 12 Nebr. 13, 10 N.W. 403; *Vilas v. Reynolds,* 6 Wis. 214. Besides, the statutory provision that the personal property of a judgment debtor is to be exhausted before recourse is had to his realty for the satisfaction of a judgment is intended solely for the benefit of the judgment debtor. *Stancill v. Branch,* 61 N.C. 306, 93 Am. Dec. 592; *Simpson v. Hiatt,* 35 N.C. 470; *Sloan v. Stanly,* 33 N.C. 627. Consequently, nobody else can object if the Sheriff levies on and sells land without first exhausting the judgment debtor's personalty. *Whitaker v. Petway,* 26 N.C. 182; *McCoy v. Beard,* 9 N.C. 377, 11 Am. Dec. 773. Moreover, the judgment debtor waives or forfeits his right to have his personal property taken in preference to his land for the satisfaction of a judgment by requesting the Sheriff to levy upon the land in the first instance, or by failing to disclose his personal property when the Sheriff is about to make a levy. *Stancill v. Branch, supra; Sloan v. Stanly, supra.*

The third objection of appellant to the judgment is predicated upon the assumption that the execution sale and the ensuing deed are void because the Sheriff did not make his formal return to the execution or execute the deed to the purchaser at the execution sale within ninety days from the issuance of the execution.

This objection is insupportable. The sale under execution took place 24 August, 1936, and was held open for ten days for the receipt of an advanced bid in conformity to G.S. 45-28. The statutory period expired without the bid being increased, and the right of the purchaser at the execution sale to a deed from the Sheriff thereupon became absolute. *Dillingham v. Gardner,* 219 N.C. 227, 13 S.E. 2d 478; *Building & Loan*

Assn. v. Black, 215 N.C. 400, 2 S.E. 2d 6; *Pringle v. Loan Asso.,* 182 N.C. 316, 108 S.E. 914. Thus, the right to the deed accrued during the life of the execution, *i.e.,* within ninety days after its issuance. G.S. 1-310. This being true, the validity of the execution sale is not affected by the delay of the Sheriff in making his formal return to the execution or in executing his deed to the purchaser. *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511; 33 C.J.S., Executions, sections 270 and 330. The deed has relation back to the sale and operates to pass title from that time. *Cowles v. Coffey,* 88 N.C. 340; *Dobson v. Murphy,* 18 N.C. 586.

What has been said fully sustains the conclusion of the trial court that the Sheriff's deed is valid and "conveyed the title to the lands therein described" to F. B. Bland.

The adjudication as to the ownership of the property by the defendant, F. B. Bland, is supportable upon the other ground specified by the trial court. The judgment debtors joined in the execution of the deed as "parties of the first part." In so doing, they did more than waive their homestead rights in the land embraced thereby. They also expressly conveyed such land to F. B. Bland "and his legal representatives in as full and ample manner as the said first parties are authorized and empowered to convey the same." Hence, the court below rightly concluded that the deed "would have passed title to the lands therein described independently of any acts or participation by the Sheriff under the execution sale, but subject to any existing judgment lien."

The appellant took an assignment of the judgment which was rendered in favor of the North Carolina Joint Stock Land Bank of Durham and against R. E. Bland and Louisa Bland by the Superior Court of Durham County on 2 October, 1933. This judgment was docketed in the Superior Court of Lenoir County on 11 October, 1933, and became a lien on real property in Lenoir County owned by the judgment debtors at the time of the docketing or acquired by them at any time thereafter "for ten years from the date of the rendition of the judgment." The land in controversy was never allotted to the judgment debtors as a homestead. Moreover, neither the appellant nor his assignor, the North Carolina Joint Stock Land Bank of Durham, was ever restrained from proceeding on the judgment "by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition." Consequently, the lien of the original judgment expired at the end of ten years from the date of its rendition, *i.e.,* on 2 October, 1943. G.S. 1-234; G.S. 1-306; *McCullen v. Durham, supra; Cheshire v. Drake,* 223 N.C. 577, 27 S.E. 2d 627; *Lupton v. Edmundson,* 220 N.C. 188, 16 S.E. 2d 840. The Legislature has decreed that an action upon a judgment shall not "have the effect to continue the lien of the original judgment." G.S. 1-47 (1). Hence, neither the action on the original judgment, which was commenced on

2 September, 1943, nor the new judgment entered in such action on 15 November, 1943, extended the lien of the original judgment beyond 2 October, 1943. The new judgment could not become a lien on any realty in Lenoir County until it was docketed on the judgment docket of the Superior Court of Lenoir County. G.S. 1-234. At that time R. E. Bland and Louisa Bland had no interest in the 29 acres.

It manifestly follows that the title acquired by the defendant, F. B. Bland, under the deed of the judgment debtors would have been freed from the lien of the original judgment on 2 October, 1943, even if the execution sale and the Sheriff's deed had been void.

Since such matter has not been mooted by the parties, we refrain from expressing any opinion as to whether the appellant ought to have proceeded by a motion in the cause rather than by this independent action. *Finance Co. v. Trust Co.*, 213 N.C. 369, 196 S.E. 340; *Weir v. Weir*, 196 N.C. 268, 145 S.E. 283.

The judgment of the court below is

Affirmed.

E. R. WILLIAMS v. FRANCES G. WILLIAMS.

(Filed 2 November, 1949.)

1. Husband and Wife §§ 12a, 12c: Trusts § 4b—

Where the husband furnishes the purchase price for lands taken in the name of the wife it will be presumed that the lands were a gift to her, but he may overcome the presumption and establish a resulting trust by clear, strong and convincing proof that the parties intended at the time the property was conveyed that she hold title for his benefit or for their joint benefit.

2. Same—

G.S. 52-12 does not apply in an action by the husband to establish a resulting trust in lands conveyed to the wife by a third person under agreement that she hold same for his benefit or for their joint benefit, since such agreement does not involve her separate estate.

3. Husband and Wife §§ 12a, 12c: Trusts § 4b—

Where the husband pays premiums on a policy of insurance on the life of the wife's father, in which the wife is named beneficiary, under an agreement between them that the proceeds of the policy should be used for the purchase of a joint home, *held*, the proceeds of the policy are not the property of the wife individually but she holds same as a trust fund, and the use of the proceeds for the purpose agreed constitutes a basis for a resulting trust in his favor notwithstanding title in the property is taken in the name of the wife.

4. Husband and Wife 15b—

During coverture the husband is entitled to the rents and profits from lands held by them by entireties to the exclusion of the wife.

5. Husband and Wife §§ 12a, 12c: Trusts § 4b—

Where, in a husband's action to establish a resulting trust, it appears upon the uncontroverted facts that joint funds were used to make a down payment on property agreed to be purchased for a joint home, although the wife alone was named grantee in the deed, and that payments on the purchase money mortgage were made with rents from the property, *held*, the husband has sufficiently established his payment of at least one-half of the purchase price of the property, since he was entitled exclusively to the rents from the property thus held in trust as an estate by entirety, and upon their subsequent divorce he may establish his tenancy in common under the resulting trust.

6. Trial § 38—

The refusal to submit an issue tendered will not be held for error when the first part of the issue follows as a matter of law upon the uncontroverted facts and the second part of the issue is expressly covered in the issue submitted.

7. Appeal and Error § 29—

Exceptions in support of which no reason or argument is stated or authority cited in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Edmundson, Special Judge,* 19 March, 1949, as of November Special Term, 1948, of WAYNE.

Civil action to have defendant declared trustee for plaintiff as to an undivided one-half interest in certain land in Wayne County, North Carolina.

These facts appear to be uncontroverted: Plaintiff and defendant were intermarried in the year 1936. They were living together in October, 1938, when a $2,500 policy of insurance on the life of defendant's father was issued by the New York Life Insurance Company. Defendant was named the beneficiary in the policy. The insured died 19 March, 1941, and the proceeds of the insurance policy, $2,512.10, was paid to defendant. Thereafter, by deed dated 10 July, 1941, T. A. Forrest and wife executed a deed to defendant by which the land in question was conveyed. The purchase price was $4,400; $900 of which was paid out of the insurance money, and the balance of $3,500 was paid with money borrowed cotemporaneously from the Goldsboro Building and Loan Association, as security for which plaintiff and defendant as husband and wife gave a deed of trust on the land in question. The balance of the indebtedness secured by this deed of trust was paid on 8 March, 1946. Thereafter, on 27 June, 1947, a decree of absolute divorce from the bonds of matri-

mony existing between plaintiff and defendant was entered in an action in Superior Court at Atlanta, Georgia.

Plaintiff alleges in his complaint, and on the trial in Superior Court offered evidence tending to show that in October, 1938, an agent of the New York Life Insurance Company had several policies of insurance issued by that company on the life of defendant's father, in which a son of the insured was named beneficiary; that defendant's father had not requested the policies to be issued, but the agent had them issued in the hope that delivery would be accepted. Neither the named insured nor the named beneficiary accepted the delivery of a certain one of the policies; that defendant brought this fact to plaintiff's attention and after discussing the matter plaintiff and defendant, then husband and wife, "agreed to accept delivery of said policy and to invest in it for the purpose of saving enough to buy a mutual home to be jointly owned by" them—it being specifically understood between plaintiff and defendant that in the event of the death of the insured the proceeds from the policy would be devoted to the purchase of a joint home; that it was agreed at the time that in order to eliminate any question as to whether plaintiff had an insurable interest in the life of the assured, defendant alone should be named beneficiary, but with distinct understanding between them that no gift of the insurance policy was being made by plaintiff to defendant, except in so far as she would benefit by their mutual and joint purchase of a home as tenants by the entirety; that pursuant thereto plaintiff paid the initial annual premium of $204.55, less the agent's commissions, reducing the payment to $150, and the policy was delivered, and the defendant was named beneficiary therein in lieu of the son of the insured; and that plaintiff paid all premiums due on the said policy on a quarterly basis of $54.20 per quarter until the death of the insured. (The evidence of plaintiff provides the details as to payments.)

Plaintiff further alleges in his complaint, and on the trial below offered evidence tending to show that after receipt of the proceeds of the insurance policy he and defendant, intending to carry out their agreement as aforesaid, negotiated for the purchase as a home a triplex unit in one apartment of which they then resided in Goldsboro, N. C.; that the owner agreed with them on purchase price of $4,400, and a deed was prepared conveying the property to plaintiff and defendant as tenants by the entirety, but that, on account of objections made by defendant's family to the title being so conveyed, he and defendant agreed for the deed to be made to her and that, when the "furor should have subsided," defendant would convey the title, or cause it to be conveyed to plaintiff and defendant as tenants by the entirety; that the transaction was closed, and the owners conveyed the property to defendant, as set forth hereinabove in the uncontroverted facts; that thereafter two units of the triplex were

rented out and he, plaintiff, paid all monthly installments of $51.00 each, falling due on the note to building and loan association so given as aforesaid for balance of purchase price and secured by the deed of trust; and that sometimes he paid from his own earnings and sometimes from the rental income; that the payments were about 60% from his own funds and about 40% from rents of the house; and that such payments were kept up until 8 March, 1946, when pursuant to a separation agreement between him and his wife, he paid from his own personal funds $1,272.44 and she paid approximately $200 from her personal funds in full of the note. (The details here are taken from evidence of plaintiff.)

Plaintiff further alleges in his complaint, and on the trial offered evidence tending to show that the purchase of the property and the payment therefor, as well as the payment of the premiums on the life insurance policy were not intended to be a gift from plaintiff to defendant, but were made for the purposes stated "and with the contract, agreement and intent that the title to the said lands should be conveyed to and held by plaintiff and defendant as tenants by the entirety"; but that defendant has failed and refused to comply with said contract and agreement; and that, by the laws of North Carolina, upon the granting of the divorce as aforesaid the said tenancy by the entirety was converted into a tenancy in common.

Defendant, on the other hand, in her answer, denies these allegations of plaintiff as to matters not uncontroverted as hereinabove stated, and on the trial in the Superior Court offered evidence tending to support the averments of her denial. And as witness for herself, she testified in part: "The mortgage to the building and loan association was to be paid $51.00 per month. I paid the installments from the rents from the two apartments which are rented in the house. The rent was $55.00 per month for both apartments and when the rent was paid I would go to the building and loan office and make the payments . . . The payments continued to be received and applied on the mortgage every month up until the time we separated."

The case was submitted to the jury upon this issue:

"Did the defendant agree to take title to the lands described in the complaint and to hold same for the use and benefit of herself and the plaintiff as alleged in the complaint?" The jury answered "Yes."

And from the judgment, declaring that plaintiff is the owner and entitled to the immediate possession of one-half undivided interest in the tract of land in controversy, etc., defendant appeals to the Supreme Court and assigns error.

L. L. Davenport and John E. Feagin for plaintiff, appellee.

J. Faison Thomson and Martin & Wellons for defendant, appellant.

WINBORNE, J. Defendant, appellant, contends primarily that the evidence shown in the record on this appeal taken in the light most favorable to plaintiff fails to make out a case for the jury. She bases her contention in the main upon these grounds: First, that the alleged agreements, on which the action is based, took place between husband and wife during coverture and, not being in writing and proved in the manner required by the provisions of G.S. 52-12 as amended, are unenforceable.

As to this contention, the principles of law most recently stated and applied by this Court in opinions by *Denny, J.,* in *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418, and *Bass v. Bass,* 229 N.C. 171, 48 S.E. 2d 48, are that "a married woman may enter into a parol agreement with her husband to hold title to real estate conveyed to her by a third party, for his benefit or for their joint benefit, and that such an agreement would not involve her separate estate, and, consequently, such contract is not required to be executed in the manner set forth in G.S. 52-12." But it is there declared that even so, a husband, in order to establish a parol trust in his favor, where his wife holds title to property purchased by him and placed in her name, must overcome the presumption that it was a gift. And that in order to overcome this presumption and establish a parol trust in his favor, in the absence of fraud, mistake or undue influence, the burden is on the husband to show by clear, cogent and convincing proof that it was the intention of the parties at the time the property was purchased and conveyed to the wife, that such property was to be held for the benefit of the husband or for their joint benefit.

The second contention is that the plaintiff has failed to show that the property in question was purchased by him. In this connection it does not appear that there is any dispute between the parties as to the sources from which the purchase money came. And if the transaction between plaintiff and defendant in respect to the insurance be as plaintiff alleges and offered evidence to prove, the insurance money, though paid to defendant as the named beneficiary, was not the property of defendant individually. Rather, she received it as a trust fund for a particular purpose,—"the purchase of a joint home." Hence, the payment of $900.00 which she made from this fund on the purchase price of the property in question inured to the joint benefit of plaintiff and defendant, as husband and wife.

Moreover, if the transaction in respect to the purchase of the house and lot be as plaintiff alleges, and offered evidence tending to prove, defendant took title thereto in trust for the benefit of plaintiff and defendant as husband and wife, that is, as an estate by the entirety. The evidence is sufficient to support the finding of the jury in this respect. Thus, even though the installment payments in the process of liquidating the debt incurred for the money borrowed and applied in payment of the balance

of the purchase price, were made as defendant contends, that is, from rents received from the property in question, this was tantamount to payment by plaintiff. For where an estate by the entirety exists the husband, during the coverture, is entitled to the full control and the usufruct of the land to the exclusion of the wife. *West v. R. R.*, 140 N.C. 620, 53 S.E. 477; *Bank v. Hall,* 201 N.C. 789, 161 S.E. 483.

Therefore it is seen, by mathematical calculation, that the monthly installments due from the date of the deed of trust to the building and loan association, 10 July, 1941, to the date of the separation between plaintiff and defendant, 8 March, 1946, at $51.00 per month, amounts to more than one-half of the whole purchase price of the property in question. Assuming that the amount of the monthly installments included payments on principal and interest, it is inconceivable that the amount of the payments on the principal would be less than one-half of the amount of the debt of $3,500.00. Since the defendant says in her testimony that those installment payments were made from rents received from the property, it affirmatively appears that plaintiff, in legal effect, has paid at least one-half of the purchase price of the property in question. Hence, no issue of fact in this respect remained to be submitted to the jury. No error, therefore, is made to appear in the ruling of the court on the motion of defendant for judgment as of nonsuit.

Defendant also assigns as error the refusal of the court to submit this issue:

"Did the plaintiff pay or furnish the purchase price or a portion of the purchase price with the agreement before the execution of the deed that the lot of land should be purchased and title taken jointly in the name of the plaintiff and the defendant?"

In the light of what is said above in respect to the evidence as to payment of the installments on the indebtedness incurred for balance of the purchase price, the first part of the issue is immaterial, and the latter part is expressly covered by the issue submitted. Hence, error is not made to appear.

Defendant also assigns as error several portions of the charge. However, when the charge is considered contextually in light of the evidence presented, no prejudicial error is shown.

Defendant has expressly abandoned numerous exceptions, and as to some others, no reason or argument being stated or authorities cited in support of them, they are, for that cause, taken as abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 544, at p. 563.

After consideration of all assignments of error, we find no just cause to disturb the judgment from which appeal is taken.

No error.

STATE v. GARNEY CHURCH, CHARLIE WYATT AND DEAN POWERS.

(Filed 2 November, 1949.)

1. Criminal Law § 52a (1)—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State.

2. Criminal Law § 31g—

The fact that the testimony of a witness as to the identity of defendants is not positive does not render the testimony incompetent but goes only to its weight.

3. Criminal Law § 52a (2)—

Testimony as to the identity of defendants as the parties, who in company with other unidentified persons, made a concerted assault with deadly weapons upon the prosecuting witnesses, *is held* sufficient to be submitted to the jury, and the fact that the State failed to introduce evidence as to the identity of such others is immaterial as to defendants' guilt.

4. Assault § 12—

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, testimony as to a threat made by one of defendants against one of the prosecuting witnesses, in conjunction with testimony tending to establish his presence at the scene at the time of the offense, is competent as tending to implicate him.

5. Criminal Law § 8b: Assault § 14a—

Where the evidence discloses that defendants made an assault upon the prosecuting witnesses, each defendant being present, and acting in concert and aiding and abetting each other in making the assaults, all are principals and equally guilty, and defendants are not entitled to the submission to the jury of the question as to the guilt of each defendant separately as to assault upon a particular prosecuting witness.

6. Criminal Law § 53g—

Where there is no evidence of defendants' guilt of lesser degrees of the crime charged, the court is not required to submit the question to the jury.

7. Assault § 14c—

Where in a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, the evidence tends to show assault upon a female at least, objection to the failure of the court to submit the question of defendants' guilt of simple assault cannot be sustained.

8. Assault § 8e—

An assault on a female, committed by a man or boy over 18 years of age, is a misdemeanor punishable in the discretion of the court.

9. Criminal Law § 81c (2)—

Where defendants are convicted of assault with a deadly weapon, the failure of the court to submit the question of their guilt of assault upon a

female, if justified by the evidence, cannot be held for prejudicial error, since both offenses are misdemeanors punishable in the discretion of the court.

APPEAL by defendants from *Pless, J.*, at March Term, 1949, of WILKES.

The defendants, Garney Church, Charlie Wyatt and Dean Powers, were charged in three separate bills of indictment with assault with deadly weapon with intent to kill, inflicting serious injury not resulting in death, on Billy Vanover, Jack Vineyard and Myrtle Jean Price, respectively.

Charlie Wyatt died before the trial, and the action abated as to him. The cases were consolidated for trial.

The State's evidence discloses that on the night of 8 January, 1949, Myrtle Jean Price, Billy Vanover, Jack Vineyard, John Vineyard, Lucille Greer and Pearlie Mae Lambert had driven from West Jefferson in a convertible Chevrolet automobile, which belonged to Jack and John Vineyard, to "Pop Triplett's Place," in Wilkes County. The place was closed when they arrived, but while they were sitting in their parked car, about 11:15 or 11:30 p.m., Charlie Wyatt went to the Vineyard car and said, "How are you all?" Someone in the car answered, "We are all right." He left and immediately several shots were fired behind the Vineyard car. Some of the occupants of the Vineyard car had seen six men get out of an automobile shortly before the shooting started, and when the first shots were fired, six men were standing behind the Vineyard car. Myrtle Jean Price testified she could not identify any of the six men; that she got out of the car and went up to three of the men and said, "Don't shoot any more in the car. There are girls in there." She further testified that she thought the three men were Garney Church, Dean Powers and Charlie Wyatt, and that the one she took to be Garney Church hit her in the eye with his fist, which "staggered" her, and someone hit her in the mouth, knocked out a front tooth, and she was "knocked out." On cross-examination she was not positive in her identification of any of the defendants except Charlie Wyatt, but she did say: "To my best knowledge I saw Garney Church and Dean Powers there that night."

The evidence further discloses that after the attack on Myrtle Jean Price, three of the men went on one side of the Vineyard car and three on the other; that Charlie Wyatt held a pistol on Billy Vanover, while Dean Powers dragged him from the car; that Vanover was beaten and left on the ground; that Jack Vineyard was shot while he was in the car, the bullet entering his shoulder.

Jack Vineyard testified that before Myrtle Jean Price got out of the car she looked through the glass and said, "I see Garney Church. Let me out, I will stop him." Thereafter he started to get out of the car, and Charlie Wyatt had a pistol and punched him in the stomach. "I

just got one foot on the ground. Pearlie said, 'Look what they have done to Bill.' Somebody hit me with something and busted my skull and knocked me out. When I next knew anything was in Glendale Springs on my way to the hospital." He also testified that he later examined his car and one bullet entered the car through the back glass and "it looked like they shot in from both front doors, (shots) went in each corner of back seat. . . . I was sitting on the left side of the back seat at the time I got shot."

Mathie Triplett testified that he was at "Pop's Place" the night of the shooting. "I knew Garney Church. I have known him about three months. I saw him the night this shooting occurred. I saw him walking down the road from his car. That was before the shooting, a matter, I reckon, of a half or two minutes, something like that. He was walking from his car when I saw him. I know his automobile, it was there. I am positive it was him, I saw. I did not see the Vineyard boys or Billy Vanover or any of the witnesses on the stand. . . . We had lights in the house. . . . I opened the door and asked what was going on out there. Shooting was going on. I saw Church just a minute before anything started. . . . I was standing in the door when I saw Garney Church; I opened it enough to stick my head out the door. I didn't know none of the rest. I saw four men."

The defendants moved for judgment as of nonsuit at the close of the State's evidence. The motion was overruled. The defendants offered no evidence and renewed their motion, which was again overruled.

The jury found the defendants guilty in each case of assault with a deadly weapon. The court imposed a sentence on both defendants in each case, of two years in the common jail of Wilkes County, to be assigned to work on the roads under the supervision of the State Highway and Public Works Commission, the sentences to run consecutively.

The defendants appeal, assigning error.

Attorney-General McMullan and Assistant Attorney-General Moody and Forrest H. Shuford, II, Member of Staff, for the State.

F. J. McDuffie and Trivette, Holshouser & Mitchell for defendants.

DENNY, J. These defendants seriously contend that their motion for judgment as of nonsuit should have been granted for the following reasons: (1) That the identity of the defendants was not sufficiently shown to warrant the submission of the charges to the jury; and (2) that the evidence is insufficient to show that the defendants conspired to assault Jack Vineyard, Billy Vanover and Myrtle Jean Price, or that they were acting in concert or aiding and abetting one another when the assaults were made.

We think the evidence adduced in the trial below, when considered in the light most favorable to the State, as it must be on motion to nonsuit, is sufficient to carry each of these cases to the jury as against both defendants. *S. v. Gentry,* 228 N.C. 644, 46 S.E. 2d 863; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Gordon,* 225 N.C. 757, 36 S.E. 2d 143; *S. v. Scoggins,* 225 N.C. 71, 33 S.E. 2d 473; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Woodard,* 218 N.C. 572, 11 S.E. 2d 882.

The inability of the State to introduce evidence as to the identity of three of the six men who were present and aiding in the assault on these prosecuting witnesses, has no material bearing on the question of the guilt or innocence of these defendants. The evidence is unequivocal as to the presence and conduct of Charlie Wyatt and Dean Powers, and while the prosecuting witness, Myrtle Jean Price, would not say positively that she knew Garney Church and Dean Powers were two of the three men she requested not to "shoot any more in the car," she did testify that she thought they were present and that she thought Garney Church was the person who hit her in the eye with his fist. The fact that this witness was not positive in her identification of these defendants did not make her testimony inadmissible. The lack of positiveness as to the identity of Dean Powers and Garney Church went only to the weight and not to the admissibility of her testimony. Stansbury, N. C. Evidence, Sec. 129. *S. v. Lytle,* 117 N.C. 799, 23 S.E. 476; *S. v. Costner,* 127 N.C. 566, 37 S.E. 326; *S. v. Carmon,* 145 N.C. 481, 59 S.E. 657; *S. v. Lane,* 166 N.C. 333, 81 S.E. 620; *S. v. Walton,* 186 N.C. 485, 119 S.E. 886; *S. v. Lawrence,* 196 N.C. 562, 146 S.E. 395. Moreover, there is other evidence on this record which tends to show that Garney Church was present before the shooting started and while the assaults were being committed. These assignments of error will not be sustained.

The defendants also except to and assign as error the admission of the testimony of Myrtle Jean Price, as to the identity of Garney Church, in response to the following inquiry by the court: "Tell upon what ground you thought you recognized him?" Among other things the witness said: "He was at the cafe earlier in the afternoon. They were in there talking. He said he had some dealings with Billy Vanover and he was going to get even with him, he didn't say how or when. . . . I had known him all my life. He was raised in the same community I was."

The existence of a motive which prompts one to do a particular act, may be considered as "a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible when the doing of the act is in dispute," Stansbury, N. C. Evidence, Sec. 83. In *S. v. Wilcox,* 132 N.C. 1120, 44 S.E. 625, it is said: "A man's motive may be gathered from his acts and so his conduct may be gathered from the motive by which he was known to be influ-

enced. Proof that the party accused was influenced by a strong motive of interest to commit the offense proved to have been committed although weak and inconclusive in itself, yet it is a circumstance to be used in conjunction with others which tend to implicate the accused." *S. v. Bynum,* 175 N.C. 777, 95 S.E. 101; *S. v. Alderman,* 182 N.C. 917, 110 S.E. 59; *S. v. Coffey,* 210 N.C. 561, 187 S.E. 754. Consequently, the threat made by Church against one of the prosecuting witnesses may be considered as a circumstance in conjunction with his presence at the scene of the crime before the shooting started, together with the other evidence, as tending to implicate him.

These defendants further contend they cannot be guilty of assaulting all three of the prosecuting witnesses, since they were fighting different parties. And on this theory they contend there is no evidence that the defendant Garney Church did anything more than to commit a simple assault on Myrtle Jean Price, and that the defendant Dean Powers did not assault Jack Vineyard or Myrtle Jean Price. Therefore, they contend the jury should not have been permitted to consider but two charges, to wit: One against Dean Powers for assaulting Billy Vanover, and the other against Garney Church for assaulting Myrtle Jean Price. The contention will not be upheld in view of the evidence disclosed by the record.

The evidence tends to show that these defendants got out of a car at "Pop's Place" after the Vineyard car was parked; that Charlie Wyatt went to the Vineyard car, doubtless for the purpose of ascertaining who occupied the car, for immediately after rejoining his associates they began to shoot in the rear of the car; and when Myrtle Jean Price got out of the Vineyard car and went where three of the six men were then standing and said: "Don't shoot any more in the car. There are girls in there," she was assaulted immediately, and one of the men fired a pistol in the direction of the car.

The jury might well have inferred from the conduct of the defendants that at the time the assaults were committed, these defendants and others had conspired to commit an assault on the prosecuting witnesses, or at least one of them, *S. v. Knotts,* 168 N.C. 173, 83 S.E. 972, but the evidence is also sufficient to show that these defendants were present, acting in concert and aiding and abetting each other in making the assaults. And an indiscriminate assault upon several individuals is an assault upon each one of them. *S. v. Merritt,* 61 N.C. 134; *S. v. Nash,* 86 N.C. 652; *S. v. Knotts, supra.* Moreover, without regard to previous agreement or design, when two or more persons aid and abet each other in the commission of a crime or crimes, all being present, all are principals and equally guilty. *S. v. Gosnell,* 208 N.C. 401, 181 S.E. 323; *S. v. Ray,* 212 N.C. 725, 194 S.E. 482; *S. v. Kelly,* 216 N.C. 627, 6 S.E.

2d 533; *S. v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113; *S. v. Forshee,* 228 N.C. 268, 45 S.E. 2d 372.

The defendants likewise except and assign as error the failure of the trial court to charge the jury that it might bring in a verdict of simple assault against each defendant on each charge in the respective bills of indictment.

But when there is no evidence to sustain a verdict of guilty of a lesser degree of the offense charged, it is not error to fail to submit issues of lesser degrees. *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Muse,* 229 N.C. 536, 50 S.E. 2d 311. There is certainly no evidence that would justify a verdict of simple assault on Jack Vineyard or Billy Vanover. There is evidence to the effect that both were assaulted with a deadly weapon and both received serious injuries. On the other hand, these defendants were not entitled to have the jury instructed that it might return a verdict of simple assault against them under the bill of indictment charging an assault on Myrtle Jean Price. *S. v. Smith,* 174 N.C. 804, 93 S.E. 910. An assault on a female, committed by a man or boy over 18 years of age, is not a simple assault according to the usually accepted meaning of that charge. It is a misdemeanor punishable in the discretion of the court. *S. v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706. The defendants were convicted of an assault with a deadly weapon, which is also a misdemeanor punishable in the discretion of the court. G.S. 14-33; *S. v. Smith, supra.* Therefore, if it be conceded that the evidence did warrant an instruction to the effect that the jury might return a verdict of guilty of an assault on a female in this particular case, prejudicial error has not been shown in view of the verdict rendered by the jury.

There are 70 assignments of error in this record, based on 99 exceptions. Obviously we have not attempted to discuss them *seriatim.* However, all of them have been carefully considered and in the trial below we find no prejudicial error.

No error.

MRS. VIRGINIA LEE LINDLEY v. KERMIT O. FRAZIER AND OSCAR LINDLEY, ADMINISTRATORS OF THE ESTATE OF A. O. LINDLEY, DECEASED.

(Filed 2 November, 1949.)

1. Executors and Administrators § 15d—

While there is no presumption that personal services rendered by a daughter-in-law are gratuitous, in her action against the estate of her father-in-law to recover for such services upon *quantum meruit* the burden still rests upon her to show circumstances from which it can be inferred

that the services were rendered and received with a mutual understanding that they were to be paid for, but proof that such services were knowingly received raises such inference.

2. Same—Evidence held insufficient to establish implied promise to pay for personal services of daughter-in-law.

Plaintiff's evidence was to the effect that she and her husband went to live with her father-in-law at his request, that her husband worked on the farm and received therefor wages or a share of the crop as agreed upon by them and that plaintiff did the cooking and household duties. Plaintiff's husband testified that his father stated he wanted him and his wife to have a home and that he had made a deed to them for a part of the tract, but there was no testimony connecting this to any promise by intestate. The deed was never delivered. *Held:* The evidence is insufficient to show an implied contract to pay for plaintiff's services, and nonsuit in her action to recover upon *quantum meruit* should have been entered.

DEFENDANTS' appeal from *Crisp, Special Judge,* July Term, 1949, RANDOLPH Superior Court.

The plaintiff brought this action against the defendant administrators to recover for services alleged to have been rendered A. O. Lindley, the decedent, basing her claim upon a *quantum meruit.*

The plaintiff, daughter-in-law of the deceased Lindley, claims that at the request of Lindley she went to live in the home and undertook for him the care of his household, doing the cooking, a large part of the ironing and other domestic duties, and that Lindley died intestate without having paid her for the services. The defendants deny the material allegations of the complaint.

A summary of the evidence pertinent to the decision follows:

Dwight Lindley, husband of the plaintiff, was released from the army on July 29, 1943, upon his own request, for the purpose of farming. He states that his father, A. O. Lindley "got me out of the army to stay with him and help take care of the farm." On August 1, 1943, Dwight came to see his father and the latter asked him to bring the plaintiff "down so she could cook for us." At that time the plaintiff was living with her father in McLeansville. The plaintiff, with her husband and one child, moved into the home of A. O. Lindley that night, and continued to reside there until the last of October, 1947. Another child was born to the plaintiff during such residence. A. O. Lindley told Dwight Lindley and the plaintiff that he was expecting them to have a home there and he made a deed for eight acres, which deed was never delivered to them.

The plaintiff did the cooking, housecleaning, part of the washing and ironing and did general housework and helped her husband in the field. A daughter of A. O. Lindley did some of the washing for him. Dwight stated that the bargain was that A. O. Lindley would pay the light bill so long as the plaintiff and her husband stayed and if she would do the

housework. Dwight Lindley helped his father complete the 1943 crop and was paid for his services. For the next three years he farmed the land on a rent-share basis, getting one-half the crop. A. O. Lindley paid for Dwight's part of the fertilizer for two years, after which Dwight paid his own expenses. Dwight Lindley testified that he and his wife bought most of the food of the household with their own money, most of which was made by his wife, who was working.

He did not, however, farm for the year 1947 because a brother had come in and there was not enough land for them all. The father was approximately 70 years old when plaintiff and her husband moved in. While unable at times to do a full day's work, he was never bedridden, and looked after the farm chores and did the milking. During this time there were two adult brothers of Dwight Lindley and a share-cropper who at intervals took their meals in the home. Plaintiff, with her husband, moved away in October, 1947, about three months before A. O. Lindley died. Dwight and his family moved back to the farm then because they had a lot there, and their furniture, and because they could not find a house.

When the plaintiff rested her case defendants demurred to the evidence and moved for judgment of nonsuit, which was overruled. Defendants excepted. Defendants offered no evidence.

The evidence was submitted to the jury and the issues were answered in favor of the plaintiff. Defendants moved to set aside the verdict for errors committed on the trial. The motion was declined and defendants excepted. To the ensuing judgment upon the verdict defendants objected, excepted, and gave notice of appeal.

Stedman H. Hines, of Hughes & Hines, and Marvin J. Gatlin for plaintiff, appellee.

T. R. Wall and Miller & Moser for defendants, appellants.

SEAWELL, J. The relationship of daughter-in-law has been held not to raise the presumption that services performed while living within the family are gratuitous. *Dunn v. Currie,* 141 N.C. 123, 53 S.E. 533; *Nesbitt v. Donoho,* 198 N.C. 147, 150 S.E. 875; *Landreth v. Morris,* 214 N.C. 619, 200 S.E. 378; *Francis v. Francis,* 223 N.C. 401, 26 S.E. 2d 907. But, although the plaintiff may not have been confronted with this presumption to hurdle, the burden still rested upon her to show circumstances from which it might be inferred that the services were rendered and received with the mutual understanding that they were to be paid for. The *quantum meruit* must rest upon an implied contract. Nothing else appearing, such an inference is permissible when a person knowingly accepts from another services of value, or, as it is sometimes put, under

circumstances calculated to put a reasonable person on notice that the services are not gratuitous. *Francis v. Francis, supra; Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764; *Ray v. Robinson,* 216 N.C. 430, 5 S.E. 2d 127; *Potter v. Clark,* 229 N.C. 350, 49 S.E. 2d 636; *Pew v. First National Bank,* 130 Mass. 391, 54 A.L.R., Anno., p. 549.

But the transaction with which we are dealing in the instant case is not so simple; much else appears to challenge the application of the rule and defeat the inference. *Carlson v. Krantz,* 214 N.W. 928 (Minn.), 54 A.L.R. 545, Anno., pp. 548, 549.

The strongest bid for recognition of an implied contract lies in the testimony of Dwight Lindley that his father stated to him and his wife that he intended they should have a home, and that he had made a deed for eight acres, (which was never delivered). This, however, appears in the evidence without any attempt to attach it or couple it with any promise made by A. O. Lindley and, in fact, without reference to the subject of compensation at all and may well be attributed to parental motives. It is not in evidence that any promise was made.

The whole evidence seems to indicate that the parties, in living together, were engaged in a joint venture or enterprise, each contributing to the extent of his or her abilities for the common good without mutual understanding that any of the services so contributed were to be paid for. No obligation survived the termination of the *modus vivendi.*

The demurrer to the evidence should have been sustained and the motion for nonsuit allowed.

The judgment to the contrary is

Reversed.

DR. H. W. BARRIER v. HOMER L. TROUTMAN AND CAROLINA AIR PARK, INC.

(Filed 2 November, 1949.)

1. Nuisances §§ 4, 5—

The ancient writ of nuisance has been superseded under the code by civil action for damages or for a removal of the nuisance, or for both. G.S. 1-539.

2.. Nuisances § 4: Injunctions § 4d—

An individual may not maintain an action for a public nuisance unless he shows unusual and special damage, different from that suffered by the general public.

3. Nuisances § 4: Injunctions § 4d—

The injured party is entitled to restrain the operation of a business or enterprise, even though lawful, when he makes it appear that in its manner

of operation it constitutes a private nuisance, but interference by the court should not extend beyond that which is necessary to correct the evil and prevent the injury.

4. Same—

Abatement of a private nuisance is not dependent upon recovery of damages.

5. Same: Injunctions § 3—

In order for an injury to be irreparable it is not required that it be beyond the possibility of repair or compensation in damages, but it is sufficient if it be one to which complainant should not be required to submit or the other party to inflict and is of such continuous and frequent recurrence that reasonable redress cannot be had in a court of law.

6. Nuisances § 1—

An airport is a lawful enterprise and is not a nuisance *per se*, but may become a nuisance if its location, structure and manner of use and operation result in depriving complainant of the comfort and enjoyment of his property.

7. Same: Nuisances § 4: Injunctions § 4d—

Plaintiff alleged that by reason of the topography and the manner of its use and operation, planes using the airport on adjoining property flew over plaintiff's clinic at a height of not more than 100 feet, so as to constitute a recurrent danger and disturbance to plaintiff and patients of his clinic. *Held:* The complaint alleges a private nuisance, and upon verdict of the jury that the airport constituted a nuisance as alleged in the complaint, plaintiff is entitled to enjoin such use notwithstanding the further finding of the jury that plaintiff had not been damaged in a special and peculiar way.

8. Costs § 3a—

Where a cause has been remanded on appeal, the taxing of costs will follow the final judgment.

APPEAL by plaintiff from *Rudisill, J.*, June Term, 1949, of CABARRUS. Error and remanded.

This was a suit to enjoin the use of an airport alleged to have been so located and operated by the defendants as to constitute a private nuisance injurious to the plaintiff.

Plaintiff alleged that defendants had constructed the runway of their airport adjoining the premises on which plaintiff maintains his home and a clinic used in connection with his medical practice; that the runway extends in an east-west direction, with the west end thereof coming within 400 yards of plaintiff's property, and is 100 feet lower in elevation; that, due to the location and construction of the runway, aircraft in taking off and landing thereon must do so at so low an altitude as to endanger plaintiff's property and disturb the peace and enjoyment of the homes of plaintiff and of other local residents, and that the continuous use and

operation of the airstrip is injurious to health of those in plaintiff's home and clinic; that aircraft using defendants' airport continually fly over plaintiff's home and clinic at a height of not more than 100 feet and branches of trees on plaintiff's premises have been broken off; that the harsh noises incident to the use of the runway disturb plaintiff and his family, and the serenity, peace and security of his home and clinic; that the operation of the airport as it is now being operated constitutes a hazard and danger to person and property of plaintiff and to those who come to plaintiff's clinic for medical treatment, and constitutes a nuisance; that defendants after notice refuse to cease the operation of aircraft upon and along said runway in the manner in which it is now being used.

During the progress of the trial the plaintiff announced he was not seeking damages but an abatement of the nuisance, and to restrain the flying of airplanes over plaintiff's house and property.

The determinative issues submitted to the jury were answered as follows:

"Is the airport of defendants so located and used that planes operating to and from it constitute a nuisance as alleged in the complaint? Answer: Yes.

"If so, has the plaintiff been damaged in a special and peculiar way by reason thereof? Answer: No."

It was adjudged that plaintiff recover nothing from defendants, that plaintiff's prayer for an injunction be denied, and that plaintiff pay the costs.

Plaintiff excepted and appealed.

Hartsell & Hartsell, John Hugh Williams, and E. T. Bost, Jr., for plaintiff, appellant.

Smathers, Smathers & Carpenter, R. Furman James, and W. S. Bogle for defendants, appellees.

DEVIN, J. The trial leading up to the verdict was without exception. The defendants did not appeal, and the plaintiff's appeal brings up only his exception to the denial of his motion for an injunction based upon the verdict of the jury.

Remedy by the ancient writ of nuisance has long since been superseded under the code by civil action for damages, or for removal of the nuisance, or both. G.S. 1-539. And the rule is established that for a public nuisance where rights and privileges common to the public or to all the people of the community are injuriously interfered with, no action lies in favor of an individual in the absence of a showing of unusual and special damage, differing from that suffered by the general public. But where the nuisance results from violation of private rights and are such

as to constitute a private wrong by injuring property or health, or where by the use of structures and permitted conditions a nuisance has been created, causing annoyance to the individual and disturbing him in the possession of his premises and rendering the use and occupancy thereof uncomfortable, injuriously affecting the peace and menacing the health and safety of his home, the law affords the injured person redress remedial or preventive. *Cherry v. Williams,* 147 N.C. 452, 61 S.E. 267; *McManus v. Southern Ry. Co.,* 150 N.C. 655, 64 S.E. 766; *Pruitt v. Bethell,* 174 N.C. 454, 93 S.E. 945; *Anderson v. Waynesville,* 203 N.C. 37, 164 S.E. 583; *Clinton v. Ross,* 226 N.C. 682, 40 S.E. 2d 593; 39 Am. Jur. 428. Where the nuisance is continuous and recurrent and the injury irreparable, and remedy by way of damages inadequate, equity will restrain, even though the enterprise be in itself lawful. But to justify injunction it must appear that the business or enterprise complained of, in the manner in which it is conducted, is a nuisance, and that interference by the court does not extend beyond what is necessary to correct the evil and prevent the injury. *Clinton v. Ross, supra.*

The equitable remedy of injunction to abate a private nuisance is not dependent upon recovery of damages, if the right is clearly established. *Simpson v. Justice,* 43 N.C. 115; *Redd v. Cotton Mills,* 136 N.C. 342, 48 S.E. 761; 2 Wood on Nuisances, 1128.

To constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. 2 Wood on Nuisances, 1126; Black's Law Dictionary; 39 Am. Jur. 425, *et seq.*

The establishment and maintenance of an airport is a lawful enterprise, of growing significance in modern life. *Goswick v. Durham,* 211 N.C. 687, 191 S.E. 729; *Turner v. Reidsville,* 224 N.C. 42 (45), 29 S.E. 2d 211; *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803. An airport may not be regarded as a nuisance *per se,* but in the location, structure and manner of use and operation it may become so where its operation deprives the complainant of the comfort and enjoyment of his property. *U. S. v. Causby,* 328 U.S. 256; *Sweetland v. Curtis Airport Corp.,* 55 F. 2d 201, 83 A.L.R. 319; *Delta Air Corp. v. Kersey,* 193 Ga. 862, 20 S.E. 2d 245; G.S. 63-13; G.S. 63-18; G.S. 63-30. In *Baltimore & Potomac R. R. Co. v. Fifth Baptist Church,* 108 U.S. 317, it was said: "That it is a nuisance, which annoys and disturbs one in the possession of his property, rendering its ordinary use and occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and

when the cause of annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance." In *Sweetland v. Curtis Airport Corp., supra,* it was said: "Courts have not hesitated to enjoin the operation of a legitimate business which, because of its location, constituted a private nuisance, when it clearly appeared that there was no other complete remedy for the injury done."

In the case at bar the verdict of the jury established the fact that the airport of the defendants was so located and used that planes operating to and from it constituted a nuisance "as alleged in the complaint." This finding was without exception by the defendants. The complaint alleged a private nuisance as distinguished from a public nuisance, that is, that the described injuries, discomforts, and annoyances resulted from violation of plaintiff's private rights rather than those common to the public generally. 1 Wood on Nuisances, 34. Hence, we think the plaintiff was entitled to the remedy by injunction, restraining the continued use and operation of the airport in such a way as to injure the plaintiff in the manner alleged in his complaint.

Plaintiff assigns error in the adjudication against him of the costs in the trial court, but as the cause must be remanded for the error herein pointed out, the costs will follow the final judgment. *Williams v. Hughes,* 139 N.C. 17, 51 S.E. 790; *Zebulon v. Dawson,* 216 N.C. 520, 5 S.E. 2d 535.

Error and remanded.

STATE v. J. R. BOWMAN.

(Filed 2 November, 1949.)

1. Criminal Law § 22—

Where in a prosecution for willful failure to support an illegitimate child, the court in its discretion withdraws a juror and orders a mistrial because it had not been made to appear that demand had been made upon defendant to support the child, the mistrial is ordered in the interest of justice and such disposition will not support a plea of former jeopardy in a subsequent prosecution for the same offense.

2. Parent and Child § 2: Bastards § 5—

In a prosecution of defendant for willful failure to support his illegitimate child conceived during wedlock of the mother, the mother, while not competent to testify as to the nonaccess of her husband, is competent to testify as to acts of illicit intercourse of defendant, that he was the father of the child in question, and had admitted paternity and promised to provide for the child and had failed to do so after demand.

3. Bastards § 6—

Evidence in this prosecution of defendant for willful failure to support his illegitimate child *is held* sufficient to be submitted to the jury.

APPEAL by defendant from *Shuford, Special Judge,* at May 9th Special Term, 1949, of CALDWELL.

Criminal prosecution upon a warrant issued out of the recorder's court of Caldwell County, 8 March, 1948, charging defendant with willful failure to provide support for his illegitimate child begotten upon the body of one Irene Roberts.

Upon trial in recorder's court the jury returned a verdict of guilty. Judgment was pronounced thereon imposing a six months' jail sentence. Defendant appealed therefrom to Superior Court.

When the case was called, and before pleading, and the impaneling of a jury, defendant entered a plea of former jeopardy. Pless, J., then presiding, found facts in respect thereto substantially these: That a warrant issued out of the recorder's court of Caldwell County on 7 March, 1947, charging defendant with willful failure to support his illegitimate child, born of Irene Roberts; that defendant was found guilty in said court and judgment was pronounced; that he appealed therefrom to Superior Court; that in course of the trial in Superior Court on such appeal, when it appeared that the prosecuting witness, Irene Roberts, had made no demand of the defendant that he support the child in question, the court in its discretion withdrew a juror and ordered a mistrial; and that later the Solicitor for the State took a *nol pros* in the case. And another warrant, the one on which present prosecution is based, was issued on 8 March, 1948.

On these facts the judge held that the plea of former jeopardy is not well taken. Defendant excepted.

A trial in Superior Court followed,—resulting in a jury verdict of guilty, on which the court sentenced defendant to a term of six months in the common jail of Caldwell County to work the roads under supervision of the State Highway and Public Works Commission. (Counsel for the prosecuting witness recommended to the court that the sentence be suspended upon condition that defendant support the child.) ("Counsel for defendant will not consent.") Defendant appealed to Supreme Court and assigned errors, among which is that the court erred "in overruling defendant's plea on former jeopardy." All the above appears from record on former appeal, No. 289 at Spring Term, 1949.

On such appeal a new trial was ordered for error in admitting incompetent evidence. See 230 N.C. 203, 52 S.E. 2d 345.

And when the case came on for second time in Superior Court of Caldwell County, it appears from the record on this appeal that before

the jury was selected and chosen defendant again entered a plea of former jeopardy—and the motion was overruled, to which he excepted.

On such retrial evidence was offered by the State, and by the defendant.

The jury again found the defendant guilty. On the verdict so finding the judgment of the court is that defendant be confined in the common jail of Caldwell County for a term of six months to be assigned to work on the roads under the control and supervision of the State Highway and Public Works Commission. He appeals therefrom to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

W. H. Strickland, John C. Stroupe, and L. M. Abernathy for defendant, appellant.

WINBORNE, J. By referring to record on former appeal, No. 289 at Spring Term, 1949, of this Court, it is seen that the first assignment of error brought forward there, as it is now, by defendant, is based upon exception to the ruling of the court in denying his plea of former jeopardy. This ruling is accordant with prevailing decisions of this Court,—so much so, that on former appeal the exception merited no particular consideration. And on this appeal the same authorities are cited by defendant as on former appeal. If the point could be presented again on this appeal, it is still without merit. It is apparent that the mistrial in question was ordered in the interest of justice. As was said by *Brown, J.*, in *S. v. Tyson,* 138 N.C. 627, 50 S.E. 456: "It is well settled and admits of no controversy that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge." See also *S. v. Guthrie,* 145 N.C. 492, 59 S.E. 652; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604, and *S. v. Dove,* 222 N.C. 162, 22 S.E. 2d 231.

Defendant next assigns as error numerous rulings of the court in permitting the prosecutrix to testify (1) to acts of sexual intercourse with defendant, (2) that he was the father of the child in question, (3) that he had said to her "that he knew it was his baby . . . and he would provide for the baby," and (4) that before 8 March, 1948, the date of the warrant on which this prosecution is based, she had demanded of defendant that he support the child—and that he has not given any support—even though he is an able-bodied man.

These assignments are held to be without merit. In the case of *Ray v. Ray,* 219 N.C. 217, 13 S.E. 2d 224, in opinion by *Barnhill, J.*, this Court, speaking of the competency of a married woman to testify as to the paternity of her child born in wedlock, had this to say: "The question

of legitimacy or illegitimacy of the child of a married woman, under the prevailing rules, rests on proof as to the nonaccess of the husband and she is not a competent witness to prove the nonaccess of the husband. But she is permitted to testify to the illicit relations in an action directly involving the parentage of the child, for in such cases, proof thereof frequently would be an impossibility, except through her testimony," citing *S. v. Pettaway,* 10 N.C. 623; *S. v. Wilson,* 32 N.C. 131; *S. v. McDowell,* 101 N.C. 734, 7 S.E. 785.

Indeed, the rulings to which these assignments of error relate are not in conflict with the rule of evidence applied in granting a new trial on former appeal, 230 N.C. 203, 52 S.E. 2d 345.

Defendant also assigns as error the denial of his motions for judgment as of nonsuit. A reading of the evidence shown in the record also discloses it is sufficient to take the case to the jury on all essential elements of the offense charged and to support the verdict rendered.

After careful consideration of all assignments of error presented by defendant for consideration on this appeal, we find

No error.

J. B. WALKER AND FANNIE WALKER v. F. B. WALKER.

(Filed 2 November, 1949.)

1. Deeds § 6—

Where there is no allegation or evidence that the deed attacked was a deed of gift, delay in recording does not invalidate the instrument.

2. Trusts § 2a—

Neither a grantor nor those claiming under him may engraft a parol trust upon his deed absolute in form.

3. Frauds, Statute of, § 9—

A parol agreement of the grantee to revest title in the grantor by destroying his deed, comes within the statute of frauds and is voidable at the election of the grantee.

4. Trusts §§ 2a, 5b—Exercise of legal right in lawful manner cannot be made basis of charge of fraud so as to create constructive trust.

Plaintiffs' allegations and evidence were to the effect that after defendant's father had conveyed the lands to him defendant requested his father to repurchase same, that the father paid a sum of money for the repurchase and went into possession, that the son said his deed had been lost and that as soon as he could find it he would destroy it and thus revest title in his father, and that subsequent to the father's death the son recorded the deed. *Held:* The parol agreement to revest title in the father comes within the statute of frauds and is voidable at the option of the son, and

therefore the action of the son in doing what he had a legal right to do cannot be made the basis for a charge of fraud so as to impress a trust upon his title to the property.

APPEAL by plaintiffs from *Rousseau, J.,* March-April Term, 1949, CLEVELAND. Affirmed.

Civil action to impress a trust upon defendant's title to certain real property.

On 3 October 1932, F. J. Walker and wife, for a valuable consideration, conveyed a ten-acre tract of land by warranty deed to defendant, their son. In the summer of 1933 defendant asked his father to repurchase the property. F. J. Walker then borrowed $300 which he paid to defendant for the repurchase. Defendant said his deed had been lost or misplaced and as soon as he could find it he would destroy it and thus revest title in F. J. Walker. No paper writing or memorandum was signed. Instead, the contract was wholly oral. After the agreement of repurchase was entered into, F. J. Walker took possession of the land and remained in possession thereof until the time of his death. On 19 October 1947, F. J. Walker died. On 28 October 1947, defendant filed his deed for registration. These are the facts disclosed by the allegations in the complaint and the testimony offered when considered in the light most favorable to plaintiffs.

Plaintiffs, heirs at law and devisees of F. J. Walker, instituted this action for judgment that defendant holds title to said land as trustee for the use and benefit of plaintiffs. The defendant denied the oral agreement to sell and reconvey and pleaded the statute of frauds.

At the conclusion of plaintiff's evidence in chief, the court, on motion of defendant, entered judgment as in case of nonsuit.

Horace Kennedy and J. W. Osborne for plaintiff appellants.

Falls & Falls for defendant appellee.

BARNHILL, J. The plaintiffs do not allege, and there is no evidence tending to show, that the conveyance from F. J. Walker and wife to F. B. Walker was a deed of gift. On the contrary, the testimony tends to show that it was supported by a valuable consideration. Hence the delay in recording the deed did not invalidate the instrument.

Nor is it contended that any agreement was made at or before the time the deed was delivered respecting the quality of defendant's title or the nature of his seizure other than such as is disclosed by the deed itself. Any such agreement attempting to bind defendant to stand seized for the benefit of the grantor, if made, would be unenforceable. *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028; *Bass v. Bass,* 229 N.C. 171.

The delivery of the deed consummated the transaction and vested title in defendant free of any claim of right of the grantor. *Turlington v. Neighbors,* 222 N.C. 694, 24 S.E. 2d 648.

The plaintiffs ground their action on an oral agreement by defendant to reconvey the premises to F. J. Walker, by the destruction of his unrecorded deed, and his alleged fraudulent misrepresentations in respect to the loss of the deed and his consequent inability to destroy it. He agreed to revest title in his father by destroying his unrecorded deed to the *locus.* This he failed to do. Now he should be compelled to comply with his agreement or else be declared trustee for the use and benefit of plaintiffs. So they contend. Their position finds no support in law or equity.

The contract to reconvey, if made, was voidable at the election of defendant. *Arps v. Davenport,* 183 N.C. 72, 110 S.E. 580; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477; *Westmoreland v. Lowe,* 225 N.C. 553, 35 S.E. 2d 613; *Wright v. Allred,* 226 N.C. 113, 37 S.E. 2d 107. Upon his denial of the contract and plea of the statute of frauds, it became wholly unenforceable. *Harvey v. Linker,* 226 N.C. 711, 40 S.E. 2d 202.

In disavowing the contract and refusing to abide by its terms, defendant was exercising a legal right and his exercise of a legal right in a lawful manner cannot be made the basis of a charge of fraud such as would impress a trust upon his title to the property.

Even if we accept plaintiffs' version of the transaction, defendant's promissory representations created no right in equity and cannot serve to vest in plaintiffs any interest in the land in the form of any type of trust known to equity jurisprudence. Certainly they are insufficient to constitute a conveyance recognized in law. Real estate is not conveyed in that manner.

Lefkowitz v. Silver, 182 N.C. 339, 109 S.E. 56, and other authorities of like import relied on by plaintiffs are not in point. Here no title passed to defendant by virtue of his representations, and he did not take title subject to any equity thereby created.

The judgment below is

Affirmed.

ZELL BROWN v. F. E. VESTAL AND WIFE, DAISY VESTAL.

(Filed 2 November, 1949.)

1. Trial § 7—

Counsel have the right to argue the law to the jury as well as the facts. G.S. 84-14.

2. Trial § 31b—

It is the duty of the court to explain the law and apply it to the testimony in the case. G.S. 1-180.

3. Same—

An instruction that the jury should be guided by the law as argued by counsel if not inconsistent with the rules of law laid down by the court, but to follow the instructions given by the court if argument of counsel was inconsistent therewith, must be held for reversible error.

4. Trusts § 4c—

In this action to impress a trust on title to realty upon allegations that at the time defendants purchased the property and took title, it was agreed that they hold it for the benefit of plaintiff and defendants, demurrer *held* properly overruled.

APPEAL by defendants from *Edmundson, Special Judge,* March Term, 1949, RANDOLPH. New trial.

Civil action to impress a trust on defendants' title to real property.

The male defendant purchased a parcel of land in Asheboro, N. C., for the sum of $60,000. Plaintiff alleges, and offered evidence tending to show, that prior to the purchase he and defendant agreed that they would purchase the tract jointly, that Vestal would proceed with the negotiations with the owner, acquire the premises, and take title thereto in his name for the use and benefit of himself and plaintiff.

Defendants admit that Vestal agreed to purchase the premises, retain therefrom a lot 300 by 300 for his own use, and "let the plaintiff in on the balance." They allege, however, that the seller's price was so high they abandoned the agreement and then at a later date Vestal purchased for his own benefit. They offered evidence in support of this and other matters pleaded in defense.

There was a verdict for plaintiff. From judgment thereon the defendants appeal.

J. A. Spence and Ferree & Gavin for plaintiff appellee.

H. M. Robins for defendant appellants.

BARNHILL, J. The court in its charge instructed the jury in part as follows:

"Now, Gentlemen of the Jury, counsel in this case for both the plaintiff and the defendant have argued to you at some length not only the evidence and facts, as was their duty so to do, but from various opinions of the Supreme Court touching the questions arising in the trial of this case. If those questions of law so argued by counsel are not inconsistent with what I have laid down as a rule of law, you should be guided by them, and

if they are inconsistent, you are to disabuse your minds of them and follow the instructions laid down by the Court."

This must be held for error.

Counsel have the right to argue "the whole case as well of law as of fact." G.S. 84-14; *Howard v. Telegraph Co.,* 170 N.C. 495, 87 S.E. 313. Frequently it is necessary for them to do so in order to present, in an intelligent manner, the facts they contend the jury should find from the evidence offered. *Sears, Roebuck & Co. v. Banking Co.,* 191 N.C. 500, 132 S.E. 468.

Even so, it is the duty of the court in its charge to explain and apply the law to the various aspects of the testimony and the jury, in arriving at a verdict, must follow the law as thus stated to them. *S. v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751; *Sears, Roebuck & Co. v. Banking Co., supra; Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630.

The court ought not to submit his charge to the jury for elimination of inconsistencies. *S. v. Jackson,* 228 N.C. 656, 46 S.E. 2d 858. *A fortiori,* the jury should not be required to compare the charge of the court on the law of the case with the statements of the law by counsel, pick and choose between the consistent and inconsistent, eliminate the inconsistent, and then decide the case under the law as applied by the court and such other law as may have been argued by counsel and deemed consistent with the charge of the court.

Not infrequently lawyers and judges find it difficult to transplant the law as limited by the facts in a case and apply it correctly to another state of facts. *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10. To require this of a jury places upon them too heavy a burden and runs counter to our system of trial by jury.

That counsel are permitted to argue the legal aspects of the case serves to emphasize the necessity of compliance with the provisions of G.S. 1-180. When counsel avail themselves of this right the court should explain and apply the law so as to remove any doubt in respect thereto which may have been engendered by conflicting statements of counsel. The duty to set at rest any question as to the law of the case rests upon the judge and not the jury.

The order of the court overruling the demurrer may not be held for error. The defendants seek to dismiss the action on the basis of an agreement the existence of which they positively deny in their pleadings and in their testimony. In any event the cause assigned is not sufficient to bar plaintiff from proceeding in equity.

For the error in the charge there must be a

New trial.

STATE v. JOHN HENRY MERRITT.

(Filed 2 November, 1949.)

1. Intoxicating Liquor § 9d: Automobiles § 29b—

Evidence tending to show that defendant was driving his automobile on a highway, that when officers attempted to stop him he attempted to elude them, threw a carton containing three gallons of nontax-paid whiskey from the car, and drove in a reckless manner until struck from the rear by the officers' car and run off the road, *is held* sufficient to overrule nonsuit upon each of the charges of illegal possession of whiskey for the purpose of sale, unlawful transportation of same, and with reckless driving.

2. Intoxicating Liquor § 9b—

The warrant charged generally that defendant had in his possession "non-tax-paid whiskey for the purpose of sale." *Held:* Upon the facts of this case the word "non-tax-paid" was merely used to describe the whiskey and to designate it as unlawful rather than to restrict the offense charged to a violation of G.S. 18-50, and therefore the *prima facie* presumption from the possession of three gallons of such whiskey, that the possession was for the purpose of sale, obtains. G.S. 18-11.

3. Criminal Law § 81c (4)—

Where equal sentences upon conviction of three separate charges are imposed to run concurrently, appellant must show error affecting all three counts in order to be entitled to a new trial or to arrest of judgment.

4. Criminal Law § 53f—

Where the State's testimony that officers had picked up three gallons of whiskey thrown from defendant's car, is not contradicted, and the whiskey is introduced in evidence, a statement in the charge that the State "offered in evidence the whiskey picked up by the officers" cannot be held for error as an expression of opinion by the court.

5. Criminal Law § 81c (3)—

The admission of evidence as to a fact admitted by defendant cannot be held prejudicial.

APPEAL by defendant from *Williams, J.*, at August Term, 1949, of SAMPSON. No error.

Attorney-General McMullan and Assistant Attorney-General Rhodes, and John R. Jordan, Jr., Member of Staff, for the State.

J. Faison Thomson and Algernon L. Butler for defendant.

DEVIN, J. The defendant was charged (1) with the unlawful possession of whiskey for the purpose of sale; (2) with unlawfully transporting same in an automobile; and (3) with reckless driving of the automobile. There was verdict of guilty on each of these counts, and judgment was

rendered on each count, sentences to run concurrently. The defendant assigns error in the ruling of the trial court in several particulars.

There was no error in the denial of defendant's motion for judgment of nonsuit. The State's evidence tended to show that the defendant was driving his automobile on the highway, and that when the officers attempted to stop him he drove away, and as the officers pursued, with siren sounding, a carton containing three gallons of nontax-paid whiskey was thrown from the automobile. Defendant continued to drive rapidly, driving in the middle and on the left side of the road, until his automobile struck from the rear by the officers' car wound up in the ditch. Defendant abandoned his automobile and ran. Defendant's evidence did not contradict the officers' testimony, his defense being that he was not driving the automobile, admittedly his, but that it was being driven by others without his knowledge or consent.

Defendant assigns error in that the court in charging the jury on the first count instructed them that proper proof of possession by the defendant of the whiskey offered in evidence by the State would raise a *prima facie* presumption that the possession was for the purpose of sale. It was argued that the warrant under which the defendant was tried was drawn under G.S. 18-49 and G.S. 18-50, and that the *prima facie* effect of the possession of intoxicating liquor given by G.S. 18-11 was inapplicable and the instruction prejudicial to the defendant. However, we observe that the warrant charged generally that the defendant did unlawfully "have in his possession non-tax-paid whiskey for the purpose of sale," and we think that the word "non-tax-paid" was used merely to describe the whiskey and to designate it as unlawful, rather than to restrict the offense charged to a violation of G.S. 18-50. For this reason the decisions in *S. v. Peterson,* 226 N.C. 255, 37 S.E. 2d 591; *S. v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629, and *S. v. Lockey,* 214 N.C. 525, 199 S.E. 715, do not support defendant's position. Considering G.S. 18-11 and G.S. 18-32 as analyzed in *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623; *S. v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449, and *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904, in the light of the evidence in this case, the instruction given may not be held for error.

Furthermore, as the verdict convicted the defendant on each of three counts and the judgment thereon imposed sentences to be served concurrently, if as to either of the charges the trial was free from error the conviction would be upheld. To obtain relief the defendant must show error affecting the whole case. *S. v. Gordon,* 224 N.C. 304, 30 S.E. 2d 43; *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151; *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363; *S. v. Revels,* 227 N.C. 34 (37), 40 S.E. 2d 474.

Defendant further assigns error in that the court in his charge to the jury, in reciting the State's evidence, said, "The State offered in evidence

the whiskey picked up by the officers," and argues that this constitutes an expression of opinion, but we do not think this manner of stating the evidence affords the defendant ground for complaint. The officer had testified he picked up three gallons of whiskey which had been thrown from defendant's automobile, and apparently this whiskey had been offered in evidence. This testimony was uncontradicted, and we see no impropriety in the use by the court of the language complained of while stating the evidence. There were other exceptions noted by the defendant, but upon examination of the entire charge in the light of defendant's criticisms, we reach the conclusion that no error which would warrant a new trial has been shown. Likewise defendant's objection to the evidence as to defendant's ownership of the automobile is without merit as the defendant in his testimony admitted its ownership.

The defendant also assigns error in the denial of his motion in arrest of judgment on the charge of reckless driving. He presents the view that the charge is insufficiently alleged in the warrant, and that the court in his charge thereon did not apply the law to the facts (*S. v. Flinchem,* 228 N.C. 149, 44 S.E. 2d 724.) However, if there be error in these respects, which is not conceded, the defendant could derive no benefit in view of his conviction on other counts properly determined.

In the trial we find

No error.

L. M. MACON v. MISS E. M. MURRAY, JOHN MURRAY, AND SAM MURRAY.

(Filed 2 November, 1949.)

Reference § 10—

Where the trial court, passing upon exceptions to the referee's report, summarily enters judgment overruling all of the exceptions and confirming the report in its entirety simply because there was evidence to support each of the findings of fact of the referee. the cause must be remanded, since the law contemplates that the court should consider and deliberately weigh the evidence adduced before the referee and make his own independent determination of the facts in passing upon the exceptions.

APPEAL by defendants from *Crisp, Special Judge,* at the July Term, 1949, of RANDOLPH.

The plaintiff sued the defendants to recover compensation for work performed by him for them in cutting timber standing on their farm and sawing it into marketable lumber. The defendants answered, denying liability. By consent of the parties, the action was referred to W. E. Gavin, Esquire, who heard the witnesses on both sides and made a report

stating separately the facts found by him and his conclusions of law thereon. The report sustained the plaintiff's version of the controversy, and concluded that he was entitled to judgment against defendants for $4,311.22 with interest thereon from 24 June, 1948, and the costs of the action. The defendants took many exceptions to the findings of fact and the conclusions of law of the referee. When the cause was heard in the Superior Court, the judge summarily entered judgment overruling all of the exceptions of the defendants and confirming the report in its entirety. He stated at the time that he took this course because the record disclosed that there was "some evidence to support the findings of fact" of the referee. The defendants excepted to the judgment and appealed, assigning errors.

J. G. Prevette for the plaintiff, appellee.

John L. Murray for the defendants, appellants.

ERVIN, J. A perusal of the record discloses that each finding of fact embodied in the report has some support in the testimony taken before the referee and reported by him to the court. Moreover, the conclusions of law of the referee are sound if the facts found by him reveal the truth in respect to the controversy between the parties. Notwithstanding these observations, the judgment must be vacated and the cause remanded to the Superior Court for further proceedings for the reason that the court below abdicated its judicial function when it overruled the exceptions of the defendants to the report of the referee and confirmed such report as a whole simply because there was some evidence at the hearing to sustain the referee's findings of fact.

Where exceptions are taken to the report of a referee, the law expects the judge, who reviews them, to decide their validity by the exercise of his own mental faculties. It does not contemplate that he will perfunctorily place the stamp of his approval upon the labor of the referee merely because a mechanical inspection of the record divulges that the findings of fact have some support in the testimony, irrespective of whether such supporting evidence be strong or weak, or credible or incredible.

When the judge passes on exceptions to the findings of fact of a referee, his task is assimilated to that of a jury. He must carefully consider and deliberately weigh the evidence adduced before the referee and returned to the court, and in that way make his own independent determination of what the truth is with respect to the mooted issues of fact. Furthermore, he should give the litigants the full benefit of his well-considered opinions upon the legal questions raised by any exceptions to the referee's conclusions of law.

The importancy of faithful observance of these principles by the judge cannot be exaggerated for a twofold reason. His review is designed to clear away errors of the referee. Besides, facts found by the judge on his review of the referee's report are accepted as final on appeal to this Court if they are supported by testimony.

These legal propositions are fully sanctioned by these decisions: *Dumas v. Morrison,* 175 N.C. 431, 95 S.E. 775; *Overman v. Lanier,* 156 N.C. 537, 72 S.E. 575; *Thompson v. Smith,* 156 N.C. 345, 72 S.E. 379; *Miller v. Groome,* 109 N.C. 148, 13 S.E. 840.

Since the court did not really consider any of the exceptions of the defendants, the judgment is set aside and the cause is remanded to the end that the judge of the Superior Court may review the referee's findings of fact and rulings of law upon the defendants' exceptions in accordance with the principles enunciated in this opinion.

Error.

LICURKIS JONES AND OLIVE JONES v. M. DeWITT BRINSON AND WIFE, MRS. LESSIE BRINSON.

(Filed 2 November, 1949.)

Trusts § 2a—

In the absence of fraud, mistake or undue influence, the grantor in a deed conveying property in fee simple may not engraft a parol trust thereon upon allegations that he had purchased the property and conveyed it to the grantee under oral agreement that the grantee would advance the purchase money and would hold the property for the use and benefit of grantor.

APPEAL by plaintiffs from *Morris, J.,* at May Term, 1949, of PAMLICO.

This is an action to enforce an alleged parol trust; and the facts pertinent to the appeal are as follows:

1. It is alleged in the complaint that the plaintiffs entered into an agreement with the defendant, M. DeWitt Brinson, to advance to them sufficient money to purchase a certain tract of land; that the owners of said land executed a deed to one of the plaintiffs, Licurkis Jones, in fee simple, for the property, on 24 December, 1947, and in turn Licurkis Jones executed a warranty deed on 30 December, 1947, conveying the premises to the defendant M. DeWitt Brinson, who paid the consideration of $1,200.00 for the land; that both deeds were duly recorded 31 December, 1947; and that it was understood at the time of the execution of the deed from Licurkis Jones to the defendant M. DeWitt Brinson, that he would hold the property for the use and benefit of the plaintiffs.

2. The complaint also alleges the deed was intended as security for the purchase money and the plaintiffs pray the court to construe and declare the deed to be in effect a mortgage, securing the amount advanced by the defendant, M. DeWitt Brinson, for the plaintiffs.

3. At the hearing below, in open court, however, counsel for plaintiffs entered the following stipulation: "That it was not contended by the plaintiff that the deed from the co-plaintiff Licurkis Jones to the defendant M. DeWitt Brinson constituted a mortgage, nor was intended to constitute a mortgage, and that it was understood at the time of its execution and delivery to be a deed, the plaintiff relying upon his contention that the deed was executed and delivered to the defendant under such circumstances as to give rise to a constructive trust (*sic*)."

The defendants demurred *ore tenus* to the complaint on the ground that it did not state a cause of action. The demurrer was sustained and the plaintiffs appeal.

Charles L. Abernethy, Jr., for plaintiffs.

A. D. Ward, H. P. Whitehurst, and Bernard B. Hollowell for defendants.

DENNY, J. The question presented for our determination is simply this: Are the allegations of the complaint sufficient to take this case out of the well settled rule that a parol trust, in the absence of fraud, mistake or undue influence, cannot be established between parties in favor of a grantor in a deed, when the parol agreement is in direct conflict with the express provisions of the written deed? The answer must be in the negative.

The plaintiffs by their stipulation have eliminated all questions of fraud, mistake or undue influence. Therefore, they bottom their right, to the relief they seek, exclusively on the alleged oral agreement to convey the land in controversy to them, upon their payment to the defendant, M. DeWitt Brinson, of the money advanced by him for the purchase of the property.

The law is well settled and firmly established in this jurisdiction, that in the absence of fraud, mistake or undue influence, a trust cannot be established between the parties in favor of a grantor in a deed, by parol evidence, when such evidence is in direct conflict with the express provisions of the written deed. *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028; *Campbell v. Sigmon,* 170 N.C. 348, 87 S.E. 116; *Walters v. Walters,* 172 N.C. 328, 90 S.E. 304; *Swain v. Goodman,* 183 N.C. 531, 112 S.E. 36; *Blue v. Wilmington,* 186 N.C. 321, 119 S.E. 741; *Davis v. Davis,* 223 N.C. 36, 25 S.E. 2d 181; *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418; *Loftin v. Kornegay,* 225 N.C. 490, 35 S.E. 2d 607; *Poston v.*

Bowen, 228 N.C. 202, 44 S.E. 2d 881; *Bass v. Bass,* 229 N.C. 171, 48 S.E. 2d 48.

The judgment of the court below is

Affirmed.

JESSE J. McDOWELL AND WIFE, ANNIE McDOWELL, v. HARVEY STALEY AND WIFE, LILLIE STALEY.

(Filed 2 November, 1949.)

1. Evidence § 29½—

A party is entitled to introduce in evidence that part of a paragraph in the pleading of the adverse party which makes an admission of an independent fact, without introducing in evidence the remainder of the allegations in the paragraph.

2. Partition § 5d: Ejectment § 17—

Defendants in partition who plead sole seizin are not entitled to nonsuit on the ground that plaintiff had introduced in evidence deed conveying the property to them, since the introduction of the deed admits its execution, but not necessarily the truth of its recitals or its legal effect. In the present case plaintiff claimed as an heir-at-law, and the deed introduced in evidence recited that the grantors therein derived title as heirs of the same ancestor, and supported plaintiff's contention that he had not conveyed his interest in the land.

APPEAL by defendants from *McSwain, Special Judge,* at January Term, 1949, of RANDOLPH. No error.

This was a petition for partition of a tract of land containing 41 acres. Plaintiff Jesse J. McDowell alleged title to a one-thirteenth undivided interest in this land as son and one of the heirs at law of J. Riley McDowell who died seized thereof in 1936. It was alleged that defendants owned the remaining twelve-thirteenths interest in said land. In their original answer, in the third parargaph, defendants admitted that plaintiff was one of the heirs of J. Riley McDowell who died seized of the land described and was entitled to a one-thirteenth interest in all the lands descended from his father, but in an amended answer defendants denied plaintiffs' title to any interest in the land and alleged title to the entire interest therein in themselves under a deed from P. W. Hulin and wife in 1943.

Plaintiff Jesse J. McDowell testified he had never made any conveyance of his interest in the land described. He also offered in evidence paragraph 3 of the original answer, and so much of paragraph 3 of the amended answer as admitted that J. Riley McDowell died seized of the lands described. Plaintiffs also offered the deed from Hulin and wife

to the defendants which recited that the land had been conveyed to Hulin and wife by Val McDowell, Lizzie McDowell and C. L. McDowell. Hulin's grantors were some of the heirs of J. Riley McDowell. One issue was submitted to the jury and answered as follows: "Is the plaintiff the owner of 1/13 interest in the lands described in the complaint? Answer: Yes."

From judgment on the verdict defendants appealed.

H. Wade Yates for plaintiffs, appellees.

J. G. Prevette for defendants, appellants.

DEVIN, J. The defendants in their appeal raise two questions:

1. Did the court err in admitting only a portion of paragraph 3 of defendants' amended answer? As the admission was of a distinct fact, to wit, that the ancestor from whom plaintiff derived title died seized of the land described, it was competent for the plaintiff to offer this without adding the other allegations in the paragraph in which defendants asserted title in themselves to the entire interest in the land. *Lupton v. Day,* 211 N.C. 443, 190 S.E. 722; *Sears Roebuck & Co. v. Banking Co.,* 191 N.C. 500, 132 S.E. 468.

2. Were defendants entitled to the allowance of their motion for nonsuit upon the ground that plaintiffs had offered in evidence a deed to the defendants from Hulin and wife? The answer is no. The rule is that a party who introduces a deed admits its execution but not necessarily the truth of its recitals or its legal effect, and may show by further evidence the truth of the matter and the relation of the deed to the entire transaction.

The deed here offered recited that the grantors derived title from three of the heirs of the ancestor under whom plaintiff claims, and tends to support plaintiff's contention that he had not conveyed his interest in the land, and that by virtue of the deed to defendants conveying interests of other heirs, the plaintiffs and defendants were tenants in common in the land. 20 Am. Jur. 771. By analogy a party who calls a witness to the stand may not impeach his veracity but by other evidence may show the facts are different. *Helms v. Green,* 105 N.C. 251, 11 S.E. 470; 58 A. J. 442.

In the trial we find

No error.

STATE v. LEE HELLER.

(Filed 2 November, 1949.)

Homicide § 27c—

In a prosecution for uxorcide where defendant's own testimony is to the effect that he did not intend to shoot his wife but intended to kill the person he thought to be her paramour whom he believed to be in the house, an instruction that if defendant feloniously and with premeditation and deliberation intended to kill another person and killed his wife instead, he would be guilty of murder in the first degree, cannot be held for prejudicial error.

APPEAL by defendant from *Rousseau, J.,* February Criminal Term, 1949, of CATAWBA.

Criminal prosecution on indictment charging the defendant with the murder of his wife, Nettie Simmons Heller.

The defendant and his wife were estranged, living separate and apart apparently on account of the wife's children, the defendant's step-children. It also appears that the defendant thought his wife was unfaithful to him and was keeping company with one Roy Simms.

On Sunday afternoon, 10 October, 1948, the defendant went to his wife's home and engaged her in conversation on the porch. She went back into the kitchen. The defendant then went to the back door, drew his pistol and shot his wife in the breast. She died almost instantly.

When the defendant was brought to the jail, he said to the jailer, "I hate I did not get him also." The defendant says the jailer misunderstood him; that what he said was he did not intend to shoot his wife but someone else, meaning Roy Simms. He thought Roy Simms was in the house.

At the close of all the evidence, the defendant tendered a plea of guilty of murder in the second degree, it appearing and being admitted that he killed his wife with a deadly weapon. This was rejected by the solicitor.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Death by asphyxiation.

The defendant appeals, assigning error.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

J. W. Hollingsworth and Russell W. Whitener for defendant.

STACY, C. J. The defendant has been convicted of a capital felony, murder in the first degree, with no recommendation from the jury, and sentenced to die as the law commands in such case. His only exception and assignment of error is to the court's instruction to the jury that if the

defendant feloniously and with premeditation and deliberation intended to kill another person and killed his wife instead he would be guilty of murder in the first degree.

It is conceded that this instruction would be correct under appropriate circumstances. *S. v. Burney,* 215 N.C. 598, 3 S.E. 2d 24; *S. v. Sheffield,* 206 N.C. 374, 174 S.E. 105; *S. v. Dalton,* 178 N.C. 779, 101 S.E. 548; *S. v. Fulkerson,* 61 N.C. 233. See, also, *S. v. Lilliston,* 141 N.C. 857, 54 S.E. 427. Here, however, the defendant says the facts do not call for its application, and hence it was misleading. *S. v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271; *S. v. Bryson,* 200 N.C. 50, 156 S.E. 143; *S. v. Lee,* 193 N.C. 321, 136 S.E. 877; *S. v. Waldroop,* 193 N.C. 12, 135 S.E. 165.

While the principle might have been applied with more directness to the facts in hand, it is manifest that no material prejudice has resulted to the defendant from the instruction as given. It finds support in the defendant's own evidence. Hence, as no reversible error has been made manifest, the verdict and judgment will be upheld.

No error.

W. A. MITCHELL, SR., AND W. A. MITCHELL, JR., TRADING AS W. A. MITCHELL & SON, A PARTNERSHIP, V. McKINLEY BATTLE.

(Filed 2 November, 1949.)

Chattel Mortgages and Conditional Sales § 22½—

A title retaining conditional sales contract for personalty is in effect a chattel mortgage, and when the property has been repossessed upon default and sold at public auction under the terms of the conditional sales contract, such repossession is not a rescission and does not return title to the vendor for his own use but solely for the purpose of sale, and therefore the vendor may recover the deficiency after applying the proceeds of the sale to the purchase price. G.S. 45-24.

DEFENDANT'S appeal from *Stevens, J.,* November Term, 1948, LENOIR Superior Court.

The defendant bought from the plaintiffs a mule, executing a conditional sales contract in which title was retained by the vendor until the installment payments on the contract were fully made. The note for the balance of the purchase price was $495 with interest at 6% per annum. The mule was in the possession of the defendant from the date of sale, April 16, 1947, until April 27, 1948, without further payment. In default of payment of the installments due, the plaintiffs repossessed the mule and it was sold under the terms of the conditional sales contract at public auction on May 25, 1948, bringing the sum of $125, which

was applied on the debt, leaving a balance due of $432.32, with interest. Plaintiffs sued to recover the deficiency. They also claim expenses for the keep of the mule pending its sale and other costs of foreclosure covered by the complaint, in addition to this amount.

The defendant demurred to the complaint, contending that the plaintiffs had exercised and exhausted all rights and interests they retained or had in the conditional sales contract; and that the repossession of the mule terminated all relationship between seller and buyer and ended all cause of action against the defendant. The demurrer was overruled and the defendant appealed.

P. H. Bell for defendant, appellant.

Allen & Parrott for plaintiffs, appellees.

SEAWELL, J. Authority in this State is against the position taken by the defendant. *Hall v. Tillman,* 115 N.C. 500, 20 S.E. 726; *Observer Co. v. Little,* 175 N.C. 42, 94 S.E. 526; *House v. Parker,* 181 N.C. 40, 106 S.E. 137.

Conditional sales contracts in which title is retained as security for the debt are treated here as chattel mortgages in this respect and statutes relating to chattel mortgage foreclosures and incidents have more than an analogical force. In *S. v. Stinnett,* 203 N.C. 829, 832, 167 S.E. 61, *Justice Brogden* says for the Court: "Moreover, it has been definitely determined that a title retaining contract of the type disclosed by the present record is in effect a chattel mortgage," citing *Harris v. R. R.,* 190 N.C. 480, 130 S.E. 319; to which we add *Charles Hackley Piano Co. v. Kennedy,* 152 N.C. 196, 67 S.E. 488. See Mordecai's Lectures, pp. 566, 567; Williston on Contracts, sec. 734 *et seq.;* Vold, Sales, pp. 289, 291.

It may be inferred from G.S. 45-24 that repossession of the title-retained property is not to be referred to the principle of rescission, but to the power of sale given by the statute, and the necessity of repossession in aid of the public sale and delivery of the chattel to the purchaser. The property does not return to the vendor in virtue of his right to its use as owner, nor is it repossessed by him for that purpose. Chapter 856, Session Laws of 1949, which is not applicable here, may well be considered to be declarative of a principle already obtaining. (27 N.C.L.R. 49.)

Conclusive on the point is *Hall v. Tillman, supra,* which we do not find modified in subsequently reported cases. In this case note the explicit statement by *Justice Avery,* speaking for the Court, at p. 504.

The judgment overruling the demurrer is affirmed.

Affirmed.

IN THE MATTER OF THE WILL OF MILLARD F. YORK, DECEASED.

(Filed 2 November, 1949.)

1. Wills § 22—

The burden is upon caveators to prove mental incapacity by the greater weight of the evidence, since the presumption is against them.

2. Wills § 23b—

It is reversible error to permit witnesses to testify that in their opinion testator had sufficient mental capacity to "make a will" on the date in question, but testimony of a nonexpert witness should be limited to his opinion as to whether testator had sufficient mental capacity to know what he was doing, what property he had and to whom he wished to give it, it being the province of the jury to decide upon the evidence whether testator had sufficient mental capacity to make the will.

APPEAL by caveators from *McSwain, Special Judge,* at January Term, 1949, of RANDOLPH.

The issue of *devisavit vel non* was answered by the jury in favor of the propounders.

In the course of the trial below, the propounders asked a number of witnesses offered by them, a question bearing on the mental capacity of Millard F. York to make a will, on the date of the instrument probated in common form, substantially as follows: "From your association with him and from what he said, do you have an opinion satisfactory to yourself as to whether or not, on 29 July, 1946, he had mind sufficient to make a will? A. Yes, sir. Q. What is your opinion? A. I think he had his right mind and was capable of making a will."

The caveators duly excepted to the admission of this evidence and appeal from the judgment entered on the verdict.

J. A. Spence and J. L. Moody for propounders.

John G. Prevette and Bell & Horton for caveators.

DENNY, J. The law presumes that a testator possessed testamentary capacity, and those who allege otherwise have the burden of proving by the preponderance or greater weight of the evidence that he lacked such capacity. *In re Burns' Will,* 121 N.C. 336, 28 S.E. 519; *In re Cherry's Will,* 164 N.C. 363, 79 S.E. 288; *In re Craven's Will,* 169 N.C. 561, 86 S.E. 587; *In re Staub's Will,* 172 N.C. 138, 90 S.E. 119. But it is improper for nonexpert witnesses to testify that in their opinion a testator did or did not have the mental capacity to make a will. *In re Will of Lomax,* 224 N.C. 459, 31 S.E. 2d 369; *S. c.,* 225 N.C. 592, 33 S.E. 2d 63; Page on Wills, 3rd Ed., Vol. 2, sec. 789.

It follows, therefore, that questions bearing on the issue of *devisavit vel non,* should be so framed as to inform the jury as to the mental condition of the testator at the time under consideration, but leaving it for the jury to decide from the evidence, upon a proper charge by the court, whether the testator did or did not have sufficient mental capacity to make the will.

A nonexpert witness may be permitted to testify from his own knowledge and observation that in his opinion a testator did or did not have sufficient mental capacity to know the natural objects of his bounty, to comprehend the kind and character of his property, to understand the nature and effect of his act, and to make a disposition of his property. Likewise, where a witness knew the testator, had conversations or business transactions with him, saw him, heard him talk and observed his conduct, such witness is competent to testify whether in his opinion the testator had the mental capacity to know what he was doing, what property he had and to whom he wished to give it. *Lawrence v. Steel,* 66 N.C. 584; *Bost v. Bost,* 87 N.C. 477; *Horah v. Knox,* 87 N.C. 483; *In re Rawlings' Will,* 170 N.C. 58, 86 S.E. 794; *In re Broach's Will,* 172 N.C. 520, 90 S.E. 681; *In re Will of Stocks,* 175 N.C. 224, 95 S.E. 360; *In re Will of Brown,* 194 N.C. 583, 140 S.E. 192; Page on Wills, 3rd Ed., Vol. 2, sec. 788; 57 Am. Jur., p. 81. But the opinions expressed by the witnesses in the trial below, to which the caveators excepted, do not fall within the permissible expression of opinion by nonexpert witnesses. *In re Will of Lomax, supra.*

The caveators are entitled to a new trial, and it is so ordered.

New trial.

PINKNEY DAVIS, ADMINISTRATOR OF THE ESTATE OF HARVEY LEE DAVIS, DECEASED, v. ERNEST RHODES AND JAMES RIGGS.

(Filed 9 November, 1949.)

1. Pleadings § 3a—

A statement of a defective cause of action is one in which there is a defect which goes to the substance of the cause of action and not merely to its form of statement; a defective statement of a good cause of action is one in which an enforceable cause of action is stated, but is stated inartificially or without sufficient clearness, or definiteness or particularity.

2. Pleadings §§ 15, 22b, 26: Negligence § 16—

A demurrer should be sustained only if there is a statement of a defective cause of action; if there is a defective statement of a good cause of action, the remedy is by motion to make the complaint more definite, G.S. 1-153, or the court may allow an amendment. G.S. 1-129. This rule applies to negligence cases.

3. Pleadings § 20—

Right to demur where the complaint contains a defective statement of a good cause of action is waived by filing answer, but demurrer to a statement of a defective cause of action is not waived by answer, but may be made at any time before final judgment.

4. Negligence § 16—

Allegations to the effect that defendant employee was driving the truck of defendant employer in the regular course of his business, that the employee approached from the rear and "unlawfully, wrongfully, recklessly and negligently" struck and collided with the motor scooter on which plaintiff's intestate was riding, thereby causing the death of intestate, *is held* to constitute a defective statement of a good cause of action, cured by an amendment particularizing the acts of negligence relied on.

5. Actions § 9: Death § 4—

Where, in an action for wrongful death, the complaint discloses that the action was instituted within one year from the death, but plaintiff is thereafter permitted to amend the defective statement of his good cause of action by particularizing the acts of negligence complained of, the amendment does not introduce a new cause of action, and the cause is not barred by G.S. 28-173.

APPEAL by plaintiff from *Williams, J.*, September Term, 1949, LENOIR. Reversed.

Civil action to recover damages for wrongful death, heard on demurrer.

This action was instituted 13 December 1947. The plaintiff in his complaint makes the necessary formal allegations and then alleges in substance that his intestate died 19 December 1946; that he was killed while riding as a passenger on a motor scooter operated by plaintiff; that the scooter was being operated on its right-hand side of the highway; that defendant Rhodes' automobile, being operated by his employee, defendant Riggs, in the regular course of his business, approached from the rear; and that the driver "unlawfully, wrongfully, recklessly and negligently" struck and collided with said motor scooter, thereby causing the death of plaintiff's intestate.

The defendants, answering, admitted the collision and the death of the plaintiff's intestate, denied any negligence on their part, and pleaded the negligence of plaintiff and his wife in bar.

Thereafter, on 23 June 1949, Frizzelle, J., entered an order permitting plaintiff to amend his complaint. Pursuant to said order, plaintiff, on 28 June, filed an amendment to the complaint in which he particularizes the acts of negligence relied upon. The defendants filed their answer thereto in which they allege by way of further answer that the original complaint "does not state a cause of action against the said defendants, or either of them," and that the amended complaint was filed 28 June 1949, more than twelve months after the death of plaintiff's intestate.

They plead the provisions of G.S. 28-173 in bar and move to dismiss the action.

At the September Term, 1949, the cause came on to be heard in the court below on demurrer *ore tenus* and the motion to dismiss. The court, being of the opinion plaintiff's alleged cause of action is barred for the reason that the original complaint does not state a cause of action and the amendment to the complaint was filed more than twelve months after the death of plaintiff's intestate, sustained the demurrer and dismissed the action. Plaintiff excepted and appealed.

Allen & Parrott and Allen, Allen & LaRoque for plaintiff appellant.

J. A. Jones, Weston Olin Reed, and Thomas B. Griffin for defendant appellees.

BARNHILL, J. Does the original complaint fail to state a cause of action for wrongful death? If so, then the complaint, as amended, was filed more than twelve months after the death of plaintiff's intestate, and the action is barred by the provisions of G.S. 28-173.

On this question the defendants contend that the original complaint is fatally defective in that it states no cause of action. On the other hand, plaintiff insists that at least it constitutes a defective statement of a good cause of action and that the amendment does not inject new matter but merely particularizes the acts of negligence on the part of the defendants relied on by plaintiff.

The question thus presented involves a question of pleading which has been the subject of discussion in many decisions of this Court. It is useless for us to quote and cite all of them. Suffice it to say that they establish well-recognized principles of law which we have consistently followed.

There is a marked difference between the statement of a defective cause of action and a defective statement of a good cause of action.

When the defect goes to the substance of the cause and not to the form of the statement, it is a defective cause of action which cannot be made good by adding other allegations not included in the original complaint. It is in no event, however expertly stated, an enforceable cause of action. *Ladd v. Ladd,* 121 N.C. 118; *Lassiter v. R. R.,* 136 N.C. 89.

When, however, there is an enforceable cause of action stated but the statement thereof is inartificially expressed, or is in general terms, or the facts are not clearly and definitely stated, or it is lacking in some material allegation, it constitutes a defective statement of a good cause. That is, if the defect goes to the form of the statement and not to the substance of the cause, it is a defective statement of a good cause. *Lassiter v. R. R., supra;* McIntosh, N.C.P.&P. 379.

A demurrer is designed to challenge the sufficiency of a complaint which contains the statement of a defective cause of action, McIntosh, N.C.P.&P. 399, 455, and is to be resorted to when the complaint is fatally defective in this respect. *Womack v. Carter,* 160 N.C. 286, 75 S.E. 1102, and cases cited; *S. v. Trust Co.,* 192 N.C. 246, 134 S.E. 656; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807; *Hartsfield v. Bryan,* 177 N.C. 166, 98 S.E. 379; *Foy v. Stephens,* 168 N.C. 438, 84 S.E. 758; *Bowling v. Bank,* 209 N.C. 463, 184 S.E. 13; *Capps v. R. R.,* 183 N.C. 181, 111 S.E. 533. Answer to the merits does not waive the defect.

That a complaint does not state a cause of action or there is a want of jurisdiction over the subject matter of the action are the radical grounds of objection to a pleading which are not waived by pleading to the merits and may be taken advantage of by demurrer at any time before final judgment. *Halstead v. Mullen,* 93 N.C. 252; *Bank v. Cocke,* 127 N.C. 467; *Power Co. v. Elizabeth City,* 188 N.C. 278, 124 S.E. 611.

When, however, the complaint alleges or attempts to allege a good cause of action but is defective in that it does not definitely and sufficiently set out all the essential, ultimate facts, or is inartificially stated, or is in general terms, demurrer will not lie if, when liberally construed, the allegations are sufficiently intelligible to inform the defendant as to what he is required to answer. The remedy is by motion to make the complaint more definite. *Allen v. R. R.,* 120 N.C. 548; *R. R. v. Main,* 132 N.C. 445; *Bowling v. Bank, supra; Canal Co. v. Burnham,* 147 N.C. 41.

"The general rule is that if there is any cause of action stated in the complaint, however inartificially expressed, the demurrer will be overruled. *Blackmore v. Winders,* 144 N.C. 212; *Caho v. R. R., ante,* 20. If the defendant desired a more certain and definite statement of the alleged negligence in order that it might know the precise nature of the charge, and so that its answer might be fully responsive to the complaint, the proper remedy was by motion" to make more definite. *Jones v. Henderson,* 147 N.C. 120; *Gillikin v. Canal Co.,* 147 N.C. 39.

A demurrer to a defective statement of a good cause of action comes too late after answer. The defendant, by answering to the merits, waives the defect which is not fatal but may be cured by amendment. He may, however, move to make the complaint more definite. G.S. 1-153; *Eddleman v. Lentz,* 158 N.C. 65, 72 S.E. 1011; *Bank v. Cocke, supra; Hitch v. Commissioners,* 132 N.C. 573; *Dockery v. Hamlet,* 162 N.C. 118, 78 S.E. 13; *Livingston v. Investment Co.,* 219 N.C. 416, 14 S.E. 2d 489.

When, as is often the case, counsel resort to a demurrer, rather than a motion to make more definite, to challenge the sufficiency of the statement of a good cause of action and the defect may be cured by amendment, the courts will allow the amendment rather than dismiss the action.

Presnell v. Beshears, 227 N.C. 279, 41 S.E. 2d 835; *Foy v. Stephens, supra;* G.S. 1-129; *Dockery v. Hamlet, supra.*

This rule applies in negligence cases. In *S. v. Trust Co., supra,* the plaintiff alleged that defendants "negligently and wrongfully" engaged in certain transactions which caused the loss for which recovery was prayed. Judgment sustaining a demurrer was reversed. Likewise in *Allen v. R. R., supra,* it was held that when the complaint is defective in not definitely and sufficiently setting out the negligence complained of, objection thereto should have been taken, not by demurrer, but by motion to have the plaintiff make his complaint more definite. Judgment overruling the demurrer was sustained. *Jones v. Henderson, supra,* and *Gillikin v. Canal Co., supra,* are to like effect. See also *Conley v. R. R.,* 109 N.C. 692. In *Dockery v. Hamlet, supra,* a wrongful death case, the cause was dismissed on demurrer for that the complaint failed to allege certain essential facts. The judgment was reversed and the cause was left open for amendment.

Here the plaintiff alleges the death of his intestate and that defendant Riggs, agent of defendant Rhodes, approaching from the rear on a public highway, "unlawfully, wrongfully, recklessly, and negligently" drove his vehicle into a motor scooter on which plaintiff's intestate was riding, thereby proximately causing the death of said intestate. This constitutes a defective statement of a good cause of action and not a statement of a defective cause of action. The defendants were thereby informed of the grievance asserted and the remedy sought. *Gillikin v. Canal Co., supra.* They deemed it sufficient to call forth an answer. *Eddleman v. Lentz, supra.* The plaintiff, in voluntarily amending after answer and before demurrer, introduced no new cause of action or new matter. He merely made the complaint more definite by particularizing the acts of negligence relied on. *Foy v. Stephens, supra.* Hence the action has been pending since its inception. The judgment dismissing the same must therefore be held for error.

The defendants rely on *Webb v. Eggleston,* 228 N.C. 574, 46 S.E. 2d 700, which they assert sustains the action of the court below. But that case is distinguishable. There, a demurrer was interposed and the court, in sustaining the same, adjudged that the original complaint failed to state a cause of action. We may concede, without deciding, that the judgment was erroneous. Even so, plaintiff elected not to appeal. In the absence of an appeal it became the law of the case, binding on us as well as the parties. Necessarily, then, the new complaint constituted new matter and for the first time stated a cause of action. As it was filed more than twelve months after the death of plaintiff's intestate, the action was barred by G.S. 28-173. *Capps v. R. R., supra,* and *George v. R. R.,* 210 N.C. 58, 185 S.E. 431, are similarly distinguishable.

For the reasons stated the judgment below is

Reversed.

WILLIE E. CULBRETH, INDIVIDUALLY, AND WILLIE E. CULBRETH, EXECUTRIX OF THE ESTATE OF D. W. CULBRETH, DECEASED, v. THE BRITT CORPORATION.

(Filed 9 November, 1949.)

1. Appeal and Error § 40a—

A sole assignment of error that the court erred in signing the judgment appealed from presents only whether the facts agreed support the judgment and whether error appears on the face of the record.

2. Deeds § 17: Judgments § 29—

Where grantors in the *mesne* conveyances are given notice by the ultimate grantee of an action contesting his title and are called upon to come in and defend the action in accordance with their respective covenants and warranties, they are bound by the adjudication of want of fee simple title in the ultimate grantee, and are concluded as to all defenses which could have been set up in that action.

3. Deeds § 17—

Where successive grantors are bound by judgment that the ultimate grantee acquired only an estate *pur outre vie*, by reason of notice and demand upon them to come in and defend the action instituted by persons claiming the fee, and thereafter the grantee recovers against his immediate grantor on the covenant and warranty of title, such grantor may recover in turn against his grantor, and it is immaterial that no notice was given him of the first action for breach of warranty, since not this judgment, but the judgment against the ultimate grantee established failure of title by which he is concluded.

APPEAL by defendant from *Nimocks, J.*, at May Term, 1948, of SAMPSON (Judgment signed 17 May, 1949, out of term by agreement).

Civil action instituted 9 July, 1946, to recover for alleged breach of warranty of title to certain tract of land in Sampson County, North Carolina—the same being composed of the two tracts of land, one containing 49 acres and the other 50 acres, designated in combination as 100 acres, which were the subjects of controversy in the action entitled *Culbreth v. Caison,* heard in this Court on appeal,—the decision being reported in 220 N.C. 717, 18 S.E. 2d 136, to which this action is a sequel.

The agreed statement of facts on which this action was heard in Superior Court incorporated substantially the same facts as those stipulated in the said former action as disclosed by the record on the said appeal. That appeal involved the interpretation of Items 1, 2 and 3 of the will of Thomas Neill Culbreth,—particularly Item 3 which related to the Cornelius Culbreth place, of which the property there in controversy is a part.

The court there held, summarily stated, that Thomas Neill Culbreth (who died testate in 1903), under the terms of his will, devised the prop-

erty in question to his children for life with restricted power of disposal and remainder to their children; that, therefore, in the proceeding for partition of said property in kind among his children, including his son, L. L. Culbreth, and his daughter, Amelia Underwood, instituted 30 March, 1904, and concluded 20 May, 1904, his son, L. L. Culbreth, took only a life estate in respect of the 49-acre tract allotted to him, and Amelia Underwood took only a life estate in respect of the 50-acre tract allotted to her; that the devise being coupled with the power to convey to one or more of the brothers or sisters in fee simple, and providing that such brother or sister shall hold the land so purchased for life with remainder in fee to the purchaser's children, L. L. Culbreth, by the deed from his sister Amelia Underwood and her husband, dated 5 February, 1905, and conveying the said 50-acre tract, acquired only a life estate therein, with remainder to his children; and that, hence, L. L. Culbreth and his wife, by the indemnity deed of trust, that is, the deed of trust dated 22 April, 1929, by which they conveyed said land to M. T. Britt, Trustee, to indemnify the Britt Corporation, *cestui que trust,* against any loss by reason of its guaranty of the payment of certain notes, under which deed of trust, by *mesne* conveyance, the defendants there claimed, conveyed no more than this life estate of L. L. Culbreth.

And, in this connection, these facts also appear:

1. That the said deed of trust from L. L. Culbreth and wife to M. T. Britt, Trustee, is second to a prior deed of trust executed by them, conveying the same land, as security for certain notes, the payment of which is guaranteed by the Britt Corporation, and contains (1) power of sale in case of default in payment as there specified, and (2) covenants of seizin, right to convey, freedom from other encumbrances, and "that they will warrant and forever defend their said title to said premises against the lawful claims of all persons."

2. That on or about 2 February, 1932, M. T. Britt, Trustee as aforesaid, pusuant to the power of sale contained in said deed of trust, foreclosed the same, and executed and delivered a trustee's deed to the purchaser at such sale, The Britt Corporation, purporting to convey said lands.

3. That thereafter on 23 December, 1933, The Britt Corporation, for a valuable consideration, to wit, $1,600.00 paid to it by D. W. Culbreth and wife, Willie E. Culbreth, conveyed the said 100 acres to D. W. Culbreth and wife, Willie E. Culbreth as tenants by the entirety, by deed sufficient in form to convey whatever title the Britt Corporation owned in the said land, which deed contained *habendum* and covenants as follows: "To HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said D. W. Cul-

breth and Willie Culbreth, and their heirs and assigns, to their only use and behoof forever.

"And the said The Britt Corporation, for itself and its heirs, executors and administrators, covenant with said D. W. Culbreth and Willie Culbreth and their heirs and assigns that it is seized of said premises in fee simple; that the same are free and clear from all encumbrances, and that it does hereby forever warrant and will forever defend the said title to the same against the claims of all persons whomsoever."

4. That on 21 November, 1935, D. W. Culbreth and wife, Willie E. Culbreth, for a valuable consideration of $2,000.00 to them paid by W. C. Caison, executed their deed to him, purporting, and in sufficient form to convey said lands in fee simple, and containing specific *habendum* and covenants of like effect to those above quoted from the deed of The Britt Corporation to them. That Willie E. Culbreth, wife of D. W. Culbreth, is a sister of L. L. Culbreth and a daughter of Thomas Neill Culbreth—and is named in Item 1 of the latter's will.

5. That on 26 February, 1940, Emmett Culbreth and others, children of L. L. Culbreth, who died intestate 19 March, 1937, instituted an action in Superior Court of Sampson County against said W. C. Caison and his wife, Nellie Caison, to recover possession of said 100-acre tract of land, and were therein adjudged to be the owners of said lands. And on appeal to the Supreme Court of North Carolina the judgment of Superior Court was affirmed by opinion filed 7 January, 1942, and reported in 220 N.C. 717, 18 S.E. 2d 136, recited hereinabove. And that thereupon W. C. Caison was ousted and dispossessed of said land.

6. That in April, 1941, during the pendency of the action described in the last preceding paragraph, "W. C. Caison caused notice of the pendency of said action, the cause of action stated therein, and to come in and defend the same in accordance with their covenants and warranty, to be served by the Sheriff of Sampson County upon Janie Culbreth (widow of L. L. Culbreth, deceased), The Britt Corporation, and Willie E. Culbreth, individually and as executrix of the estate of D. W. Culbreth, deceased, but neither of said parties so notified ever came in and became a party to said action or defended said action, nor did either of them contribute anything whatever in defense thereof."

7. That on 20 February, 1943, said W. C. Caison brought an action in Superior Court of Sampson County against said Willie E. Culbreth, individually and as executrix of the estate of D. W. Culbreth, to recover his loss and damages by reason of the breach of their warranty to him of the title to said 100-acre tract of land,—by the failure of such title as result of the said action against him by the children of L. L. Culbreth, to wit, $1,950.00 with interest, costs and attorney's fee expended in defending said action. And that on 17 August, 1943, this claim of W. C.

Caison was settled by Willie E. Culbreth, individually and as executrix of the estate of D. W. Culbreth paying to him the sum of $2,926.67, together with costs of the action, and a consent judgment effectuating the settlement was entered in said action by consent of attorneys for plaintiff and for defendants.

"That neither The Britt Corporation nor said Janie Culbreth was served with any notice of the pendency of said action, nor made parties thereto, nor did either of them contribute in any way to the defense of said action, and so far as the record disclosed neither of them knew of the pendency of said action."

8. That "the present action was commenced 9 July, 1946, wherein the plaintiffs . . . demand judgment against the defendant The Britt Corporation upon the contract of warranty of title and seizin upon the part of The Britt Corporation in the sale of the lands in controversy to D. W. Culbreth and wife, Willie E. Culbreth, and by reason of the breach of said warranty . . . their damages . . . the sum of $1550 with interest, being the purchase money with interest paid by them to The Britt Corporation for said land . . . the further sum of $300 attorney's fee and $68.05 costs reimbursed by them to said W. C. Caison, and the cost of this action."

When the cause came on for hearing in Superior Court, a jury trial being waived, and it being agreed that the presiding judge might hear and determine the cause and enter judgment herein out of term, out of the county, and out of the Judicial District, on the agreed statement of facts, the presiding judge being of opinion that, by reason of the notice of the pendency of action by the children of L. L. Culbreth against said W. C. Caison, served on The Britt Corporation and the present plaintiffs in this action, The Britt Corporation and the present plaintiffs are bound by the record and judgment in said action whereof they were notified; and being of the further opinion that upon the agreed facts that plaintiffs are entitled to recover of the defendant as thereinafter set out, entered judgment on 17 May, 1949, that plaintiffs recover of defendant $1,918.05 with interest and costs to be taxed, etc.

Defendant appeals therefrom to Supreme Court and assigns error.

J. Abner Barker and Faircloth & Faircloth for plaintiffs, appellees.

Butler & Butler for defendant, appellant.

WINBORNE, J. The only assignment of error presented on this appeal is that the court erred in signing the judgment set out in the record. This assignment of error raises only the questions (1) as to whether the agreed facts, on which the trial judge acted, support the judgment, and (2) whether error in matters of law appears upon the face of the record.

Simmons v. Lee, 230 N.C. 216, 53 S.E. 2d 79, and cases cited. See also *Van Hanford v. McSwain,* 230 N.C. 229, 53 S.E. 2d 84; *Employment Security Comm. v. Roberts,* 230 N.C. 262, 52 S.E. 2d 890; *Credit Corp. v. Roberts,* 230 N.C. 654, 55 S.E. 2d 85; *Parker v. Duke University,* 230 N.C. 656, 55 S.E. 2d 189; *Henderson County v. Johnson,* 230 N.C. 723, 55 S.E. 2d 502.

Defendant, in brief filed in this Court, contends that the judgment from which appeal is taken is erroneous in many aspects, and states ten questions as being involved,—nine of which it debates at length. In the main these contentions are predicated upon the premise that defendant is not bound by the judgment rendered in *Culbreth v. Caison,* 220 N.C. 717, 18 S.E. 2d 136. This assumption is untenable. See *Jones v. Balsley,* 154 N.C. 61, 69 S.E. 827; *Cover v. McAden,* 183 N.C. 641, 112 S.E. 817.

The pertinent principles of law are stated by this Court in the *Cover case* in opinion by *Adams, J.,* in this manner: "In the modern law a covenant of warranty is treated as an agreement of the warrantor to make good by compensation in money any loss directly caused by failure of the title which his deed purports to convey. It is not always essential to the grantee's right of action on the covenant that he should give his covenantor notice to come in and defend the title. But if no notice is given, the covenantee, in his suit against the covenantor for breach of warranty, does not make out a *prima facie* case by showing judgment and eviction, he must show, in addition, that he was evicted under a paramount title, unless the covenantor was a party to the suit that brought about the eviction. 15 C.J. 1265, Sec. 97. In *Jones v. Balsley, supra, Walker, J.,* approved the doctrine stated in *Carroll v. Nodine,* 41 Oregon, 412, to this effect: 'Before an indemnitor can be expected to defend, he must have reasonable notice of the pendency of the suit or action by which he is to be bound, and afforded an opportunity to participate in or interpose such defense as he may desire; and it is only by complying with such conditions that the party to be indemnified can estop the indemnitor to controvert the matter anew in an action against him upon the indemnity contract or obligation.' And the Court concludes 'that the great weight of authority in England and in this country is to the effect that it is sufficient to conclude the vendor by the judgment if he is made constructively a party by substantial notice to come in and defend his title, and that it is not necessary that he be actually a party to the suit,'" citing *Jones v. Balsley, supra.*

In the present case it is specifically agreed as a fact that W. C. Caison, the defendant there, caused notice of the action and its purpose to be given to the parties who are now the plaintiffs and the defendant in the present action, and called upon them to come in and to defend the action in accordance with their covenants and warranties. Thus the decision in

Culbreth v. Caison, supra, establishes the failure of title and concludes both plaintiff and defendant on all defenses to the action which could have been pleaded there. *Gibbs v. Higgins,* 215 N.C. 201, 1 S.E. 2d 554, and cases cited. Indeed, the defenses pointed out by defendant in this action are, in the light of the agreed facts, not tenable.

And the parties agree that pursuant to the judgment in *Culbreth v. Caison, supra,* W. C. Caison was evicted from the land in question to which the warranty of title relates.

Furthermore, the facts agreed show that the amount for which the action of W. C. Caison was settled by the defendants there, who are the plaintiffs here, is the purchase price plus interest, attorney's fee and costs,—the measure of damages as to which there seems to be no controversy. It was not necessary that The Britt Corporation, defendant here, be given notice of the action which W. C. Caison brought against his immediate covenantor, the plaintiffs in the present action. For defendant's liability on the warranty contained in its deed to the plaintiffs here resulted by the failure of title which was declared by the judgment in *Culbreth v. Caison, supra,* by which it is concluded. And the plaintiffs here, having satisfied the damage sustained by W. C. Caison, are in position to recover of defendant here on the warranty of title made in its deed to the plaintiffs—by the measure of damages applied. See *Williams v. Beeman,* 13 N.C. 483; *Markland v. Crump,* 18 N.C. 94.

Other contentions as to error in the judgment below have been given due consideration, and are held to be without merit.

Hence the judgment below is

Affirmed.

LOTTIE B. TOWNSEND v. CAROLINA COACH COMPANY, A CORPORATION.

(Filed 9 November, 1949.)

1. Negligence § 1—

As a general rule, negligence of one person will not be imputed to another unless the relationship of master and servant exists between them.

2. Judgments § 27a—

Service of summons was had on defendant bus company by service on an employee of the lessees of a bus station who sold tickets for the bus companies using the station, G.S. 1-97 (1). The ticket saleswoman failed to notify defendant, and judgment by default final was taken against it. *Held:* The neglect of the ticket saleswoman will not be imputed to defendant, and the trial court had discretionary power to set aside the judgment upon a showing of meritorious defense. G.S. 1-220.

3. Same: Constitutional Law § 21—

The intent and purpose of the statutes in regard to service of summons is to give notice and an opportunity to be heard, and where service is had upon a statutory process agent who is not in fact an agent or officer of defendant corporation, the imputation of the negligence of such process agent to the corporation so as to preclude it from moving to set aside a default judgment against it for surprise and excusable neglect would be a denial of due process of law. Fifth and Fourteenth Amendments to the Federal Constitution, Art. I, sec. 17, of the Constitution of North Carolina.

APPEAL by plaintiff from *Bennett, Special Judge,* at August Term, 1949, of CABARRUS.

This case was before us at the Fall Term, 1948, on appeal from a judgment dismissing the action. Default judgment had been entered theretofore for loss of baggage and wearing apparel in the sum of $676.00. The trial judge held the plaintiff had not obtained valid service of summons on the defendant. The ruling was reversed, "without prejudice to the right of the defendant to move to set aside the judgment for excusable neglect, if so advised." See *Townsend v. Coach Co.,* 229 N.C. 523, 50 S.E. 2d 567, where the facts are fully stated.

The defendant in apt time moved to set aside the judgment, on the ground that it had been taken through the mistake, inadvertence, surprise or excusable neglect of the defendant, and set out as a meritorious defense, its contention that its liability, if any, is limited by statute to $50.00.

His Honor found the facts and held the judgment was taken through the mistake, inadvertence, surprise or excusable neglect of the defendant; that the defendant had a meritorious defense, and, for the reasons stated, set aside the judgment in his discretion.

The plaintiff appeals and assigns error.

B. W. Blackwelder for plaintiff.

Arch T. Allen and E. T. Bost, Jr., for defendant.

DENNY, J. The decision on this appeal turns on whether or not the mistake, inadvertence or neglect of one who is not an officer or employee of a corporation, but a statutory agent upon whom process may be served, may be held to constitute surprise or excusable neglect within the purview of G.S. 1-220.

Where service is obtained by publication, or upon a nonresident driver of a motor vehicle, as provided in G.S. 1-105 and 1-107, the defendant against whom such service is obtained "or his representative, on application and sufficient cause shown at any time before judgment, *must be allowed to defend the action;* and, except in an action for divorce or in an action for the foreclosure of county or municipal taxes, the defendant

against whom publication is ordered, or his representative, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as are just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. . . ." G.S. 1-108. *Russell v. Edney,* 227 N.C. 203, 41 S.E. 2d 505; *Moore v. Rankin,* 172 N.C. 599, 90 S.E. 759; *Page v. McDonald,* 159 N.C. 38, 74 S.E. 642; *Bank v. Palmer,* 153 N.C. 501, 69 S.E. 507.

It will also be noted that in order to obtain service on a nonresident driver of a motor vehicle, under the provisions of G.S. 1-105, the plaintiff or the Commissioner of Motor Vehicles must forthwith notify the defendant of such service and forward a copy of the process by registered mail, and the defendant's return receipt and the plaintiff's affidavit of compliance with the provisions of the statute must be filed with the summons, complaint and other papers in the cause. And the statute further provides: "The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action."

Likewise, it is provided by statute, that service of process may be obtained on a corporation doing business in this State, whether incorporated under its laws or not, under certain circumstances by serving the process on the Secretary of State. However, the statute requires the Secretary of State in such cases, to mail the copy of process served on him to the president, secretary or other officer of the corporation, upon whom, if residing in the State, service could be obtained. G.S. 55-38.

Substantially the same procedure is required to obtain service of process on an insurance, bonding or surety company, admitted and authorized to do business in this State, when the process is served on the Commissioner of Insurance. G.S. 58-154.

It is provided in G.S. 1-97 (1) that service of process on a corporation may be obtained by delivering summons "to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof." Then the statute contains this further provision: "Any person receiving or collecting money in this state for a corporation of this or any other state or government is a local agent for the purpose of this section."

The primary purpose in the enactment of the latter provision was to provide a method of service on a domestic or foreign corporation when the officers of the corporation reside at a great distance. *Townsend v. Coach Co., supra.* This being true, we do not think the mistake, inadvertence or neglect of such an agent is imputable to the corporation so as to deny relief as a matter of law, under the provisions of G.S. 1-220. We

think there is a distinction in this respect between officers and agents who represent a corporation as its officers and agents resulting from their official or contractual status and one who is an agent by operation of law. It is the general rule that unless the relation of master and servant exists, the law will not impute to a party the negligent acts of another. *Johnson v. Turner,* 319 Ill. 265, 49 N.E. 2d 297; *Jenks v. Veeder Contracting Co.,* 177 Misc. 240, 30 N.Y.S. 2d 278.

It is the intent and purpose of the law that no judgment of the character entered below, shall be taken against a defendant until after due notice has been given by service of process on such defendant as provided by law, and that such defendant shall be given a reasonable opportunity to defend the action. Here the defendant has been served with process, but given no opportunity to defend; no officer or agent, charged with the duty of defending actions against the corporation, knew of the existence of the suit until after judgment had been taken. To hold as a matter of law, that no relief could be granted in such a situation would, in our opinion, be a denial of due process of law. Const. of U. S., Fifth and Fourteenth Amendments; Const. of N. C., Art. I, Sec. 17; *Galpin v. Page,* 85 U.S. 350, 21 L. Ed. 959; *King Tonopah Mining Co. v. Lynch,* 232 Fed. 485; Process & Service by Bowers, Sec. 349, at p. 515; Harvard Law Review, Vol. 40, p. 905; Minn. Law Review, Vol. 11, p. 559. "The fundamental object of all laws relating to service of process is to give that notice which will, in the nature of things, most likely bring the attention of the corporation to commencement of the proceedings against it." 42 Am. Jur., p. 99.

The agent upon whom process was served in this case, had no contractual relationship with the defendant. She was an employee of the lessees of the Concord Bus Station and sold tickets for the defendant and other bus lines using the facilities of the station; and the lessees remitted the receipts from the sale of such tickets to the respective bus companies. Conceding she was negligent in not notifying the defendant of the service of process on her, we think his Honor was clothed with the power, under the provisions of the statute, to hold such neglect was excusable on the part of the defendant, thereby giving him the right, in his discretion, to set aside the judgment. *Rierson v. York,* 227 N.C. 575, 42 S.E. 2d 902; *Everett v. Johnson,* 219 N.C. 540, 14 S.E. 2d 520; *Skinner v. Terry,* 107 N.C. 103, 12 S.E. 118; *Rollins v. Ins. Co.,* 107 W. Va. 602, 149 S.E. 838; *Stretch v. Montezuma Min. Co.,* 29 Nev. 163, 86 Pac. 445; *Roberts v. Wilson,* 3 Cal. App. 32, 84 Pac. 216; Fletcher Cyclopedia Corp., Vol. 18, Sec. 8740, p. 465; Freeman on Judgments, Vol. 1, Sec. 250, Accident and Surprise, p. 503.

In *Skinner v. Terry, supra,* this Court said: "The statutory provision (The Code, sec. 274), (now G.S. 1-220), invoked by the defendant, pro-

vides that 'The judge . . . may also, in his discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect,' etc. This implies not simply any, but reasonable mistake, inadvertence, or excusable neglect as to, or surprise occasioned by some fact, or something that has or has not been done, of which the complaining party ought to have knowledge, and which, if he had had such knowledge, might have prevented the judgment, order or other proceeding of which he complains."

It is also said in 49 C.J.S., sec. 280 (c), at p. 503: "The surprise contemplated by the statute is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against." *Miller v. Lee,* 52 Cal. App. 2d 10, 125 P. 2d 627.

In the case of *Rollins v. Ins. Co., supra,* service of process was accepted by the State Auditor. An employee in charge of such matters in the Auditor's office, filed an affidavit to the effect that, according to his records, copy of the summons was forwarded to the defendant by registered mail and that a return receipt was requested by his office, but that none was received. An officer of the defendant corporation filed an affidavit to the effect that he had charge of all correspondence from the Auditor of West Virginia to his company, and that the summons was never received by his office; that defendant had no knowledge of the suit until after judgment had been rendered against it; and that it had a good defense. The Court said: "The loss of the summons in the mail was a circumstance entirely beyond the control of the defendant and was occasioned by no neglect on its part. That circumstance was adventitious in that it was unusual and unexpected. . . . Suppose a person upon whom a summons has been served is immediately stricken with amnesia, which continues until after judgment is rendered against him. Would any court hesitate to vacate the judgment upon motion seasonably made? While the statute makes the acceptance of the summons herein by the auditor notice to the defendant, nevertheless the defendant was in reality as ignorant of the pendency of this suit as would have been one suffering from amnesia. Therefore, the circumstance presented by defendant is clearly within the judicial designation of good cause. No reason appears why the judgment should not be set aside under this showing."

We are not inadvertent to the principle that corporations, domestic or foreign, doing business in a state are deemed to have assented to its lawful methods of serving process. Even so, it is contemplated that the attention of some officer or agent of a corporation, whose duty it is to defend actions, will receive actual notice of its pendency before judgment is

taken. And where no such officer or agent has any notice of the pending action, until after judgment, such corporation has not had its day in court; and a day in court means an opportunity to be heard after notice to appear.

The ruling of his Honor in setting aside the judgment and permitting the defendant to file answer, is

Affirmed.

MRS. W. E. BAILEY AND MRS. FANNIE BAILEY HOLLAND, PARTNERS, TRADING AS W. E. BAILEY PLUMBING & HEATING COMPANY, v. RACHEL D. DAVIS.

(Filed 9 November, 1949.)

1. Pleadings § 6—

A pleading is "filed" when it is delivered for that purpose to the proper officer and received by him, and upon plaintiff's admission that answer had been filed, it will be presumed that copy thereof for the use of plaintiff had likewise been filed and mailed to him or his attorney of record, as required by statute. G.S. 1-125.

2. Judgments § 9—

Judgment by default may be entered only when defendant has not answered, and therefore when answer has been filed, even though after time for answering has expired, the clerk is without authority, so long as the answer remains filed of record, to enter judgment by default. G.S. 1-209; G.S. 1-214. Upon filing of answer and joinder of issues, the cause is, in effect, transmitted by operation of law to the Superior Court. G.S. 1-171.

3. Judgments § 27a—

A motion in the cause to set aside a default judgment on the ground that at the time it was rendered by the clerk a duly filed answer appeared of record, *is held* not a motion to set aside for surprise and excusable neglect, since G.S. 1-220 applies only when the judgment is rendered according to the course and practice of the court.

4. Courts § 4c: Pleadings § 6—

Upon appeal from the denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record, the Superior Court acquires jurisdiction of the entire cause, G.S. 1-276, and has the power to permit the answer to remain of record, even though it was filed after time for answering had expired. G.S. 1-152.

APPEAL by plaintiffs from *Edmundson, Special Judge,* at May Term, 1949, of LENOIR.

Civil action to recover on contract for an oil burning furnace, etc., installed in office building of defendant.

On 21 January, 1949, the Clerk of Superior Court of Lenoir County, upon motion of attorney for plaintiffs, entered judgment by default final against defendant upon these findings of fact: That summons issued in this action on 18 December, 1948, and plaintiffs filed duly verified complaint on same date; that the summons, together with a copy of the complaint so filed, was duly, regularly and personally served upon defendant on 18 December, 1948, by the Sheriff of Lenoir County, acting through his duly authorized deputy sheriff by delivering to her a copy of the summons and a copy of the said complaint; that defendant filed no answer within the time allowed by law, and made no appearance of any kind, either in person or by attorney, and no extension of time in which to plead was either requested by defendant or granted to her within the time provided by law in which to answer the plaintiffs' complaint; that more than thirty days have elapsed since the said service of summons and complaint, and the time for answering said complaint expired on 17 January, 1949; that the complaint sets forth a cause of action for breach of an express contract to pay a sum of money fixed by the terms of the contract or capable of being ascertained therefrom by computation—an itemized statement of the amount claimed by plaintiffs being attached to and forming a part of the complaint and served with the summons and complaint, etc.

Defendant moved, on 22 January, 1949, to set aside the foregoing judgment for that defendant duly filed answer as appears of record on 19 January, 1949, before judgment was rendered, and said answer has not been set aside and no motion made, or notice given of motion to be made before said clerk of Superior Court to set aside the answer, and defendant further moved that the answer filed on 19 January, 1949, be allowed as filed on said date on grounds set out in affidavit and written motion. The answer appears in the record and purports to deny the indebtedness alleged in the complaint, and to set up a counterclaim.

Plaintiffs filed answer to the motion and affidavit of defendant, in which among other things plaintiffs say: (1) "It is further admitted that the defendant's attorney prepared and filed a paper writing purporting to be an answer on the 19th day of January, 1949, . . ."; (2) "That on the 19th day of January, 1949, and without notice to plaintiffs' counsel . . . counsel for defendant filed a paper writing purporting to be an answer; that plaintiffs' counsel received a copy of the paper writing . . . on January 20, 1949, and in the same mail received a letter from the plaintiffs instructing him to move for judgment, whereupon the plaintiffs, through counsel, moved for judgment by default on January 21, 1949, which judgment was signed and entered by the clerk of the Superior Court of Lenoir County"; and thereupon plaintiffs pray (1) that the motion of defendant to set aside the judgment so entered be denied; (2)

that the paper writing filed by defendant on 19 January, 1949, purporting to be an answer to plaintiffs' complaint, be stricken and withdrawn from the court papers; and (3) that defendant's motion be dismissed at her cost.

The motion to set aside the judgment was disallowed, and defendant appealed to the Superior Court.

When the appeal came on for hearing in Superior Court the presiding judge, being of opinion that the ruling to be made upon defendant's motion is entirely within the sound discretion of the court, and that the plaintiffs' request to find the facts should be denied, and defendant's motion should be allowed, entered an order, in the discretion of the court, that the judgment by default final rendered by the clerk of Superior Court of Lenoir County on 21 January, 1949, in this cause be and the same is thereby vacated and set aside; and "that the paper writing filed by the defendant on 19 January, 1949, be and it is hereby allowed and filed as the defendant's answer, with leave to the plaintiffs to plead thereto as provided by law."

Plaintiffs appeal therefrom to Supreme Court, and assign error.

Thos. J. White for plaintiffs, appellants.

Whitaker & Jeffress for defendant, appellee.

WINBORNE, J. Appellants contend that the judge below erred in not treating the motion of defendant as a motion to set aside the judgment by default for excusable neglect, pursuant to provisions of G.S. 1-220, and in not finding facts in accordance therewith. It may be conceded that if the judgment in question had been taken according to the course and practice of the court, the judge, under this statute, should find the facts of excusable neglect and meritorious defense. However, in the light of pertinent statutes in this State and pertinent decisions of this Court, the judgment here was entered without authority in that judgment by default may be entered only when defendant has not answered. G.S. 1-211 and G.S. 1-214. Hence the provisions of G.S. 1-220 are inapplicable.

The General Statutes of North Carolina, G.S. 1-125, provide that defendant must appear and answer or demur within thirty days after service of summons upon him; and that the clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days, except by consent of the parties.

And it is provided in G.S. 1-211 that judgment by default final may be had on failure of defendant to answer, and in G.S. 1-214 that if no answer is filed the plaintiff shall be entitled to judgment by default final or default and inquiry as authorized by G.S. 1-211, etc.

This raises the question in the present case as to whether an answer had been filed in a legal sense at the time the clerk entered the judgment by default final. As to this, it is pertinent to note that G.S. 1-125 further provides that defendant, when he files answer, shall likewise file at least one copy thereof for the use of the plaintiff and his attorney; that the clerk shall not receive and file any answer until and unless such copy is filed therewith; and that the clerk shall forthwith mail the copy of answer filed to the plaintiff or his attorney of record. In the light of these provisions it may be fairly inferred from the fact, admitted by plaintiffs, that a copy of the answer was mailed to plaintiffs' counsel, that defendant filed with the clerk a copy of her answer, and that the clerk mailed it, thereby taking cognizance of the filing.

Moreover, the parties say that defendant filed what purports to be an answer,—though two days late. What then is the meaning of the word "filed"? It has a distinct significance. This Court, speaking of it in the case of *Power Co. v. Power Co.,* 175 N.C. 668, 96 S.E. 99, stated: "It has been held that 'a paper writing is deemed to be filed within the meaning of the law when it is delivered for that purpose to the proper officer and received by him, and it is not necessary to the filing of a paper that it shall be endorsed as having been so filed. The file mark of the officer is evidence of filing, but it is not the essential element of the act,' unless the statute makes it so." Authorities are cited, including in principle the cases of *Glanton v. Jacobs,* 117 N.C. 427, 23 S.E. 335, and *Smith v. Lumber Co.,* 144 N.C. 47, 56 S.E. 555.

Thus on the face of the record on 21 January, 1949, when the clerk acted upon the motion of plaintiffs for judgment by default final, it appeared that defendant had filed an answer on 19 January, 1949. If it were not filed within the meaning of the law plaintiffs, upon motion so to do, might have had the answer stricken from the record, and, if such motion were allowed, to move then for judgment by default final. This was not done.

And while the clerk is authorized by statute, G.S. 1-209, to enter all judgments by default final as are authorized in G.S. 1-211, and others, the situation of the record, at the time he came to act on plaintiffs' motion for such judgment, failed to present a case where the defendant had not answered. Hence, so long as the answer remained filed of record, the clerk was without authority to enter a judgment by default final. This being so, the judgment entered may, on motion in the cause, be set aside.

And it is noted that we have here more than there was in the case of *Elramy v. Abeyounis,* 189 N.C. 278, 126 S.E. 743, where it is said, "the defendant's attorney deposited in the clerk's office a paper writing." Hence that case is not controlling here.

Furthermore, this Court has held that where the plaintiff is entitled to judgment by default before the clerk for failure of defendant to answer within the statutory time, he waives this right by waiting until after the clerk has permitted an answer to be filed and the matter has been transferred to the civil issue docket for trial. *Cahoon v. Everton,* 187 N.C. 369, 121 S.E. 612.

Moreover, it is provided by statute, G.S. 1-171, that the pleadings shall be made up and issues joined before the clerk and that after the pleadings have been so made up and issues joined, the clerk shall forthwith transmit the original papers in the cause to the court at term for trial upon the issues, when the case shall be proceeded with according to the course and practice of the court. The transmission is, in effect, by operation of law. Hence, when the answer was filed the transmission took place,—and the case was in Superior Court.

This Court also held in the *Cahoon case, supra,* that where the plaintiff has waived his right to judgment by default before the clerk, and the cause has been transferred to the civil issue docket for trial, the trial judge has the authority, under the provisions of G.S. 1-152, formerly C.S. 536, to allow defendant to amend his answer. In truth, the statute declares that "The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time." But whether this cause was in Superior Court by operation of law or by appeal of defendant from order of the clerk, the judge has jurisdiction. It is provided in G.S. 1-276 that "whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so." This provision is applied most recently in *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602; *Moody v. Howell,* 229 N.C. 198, 49 S.E. 2d 233, and *Plemmons v. Cutshall,* 230 N.C. 595, 55 S.E. 2d 74.

For reasons stated, the judgment below is

Affirmed.

IN THE MATTER OF THE RESTRAINT OF NORMAN DOUGLAS CRANFORD.

(Filed 9 November, 1949.)

1. Parent and Child § 4a: Clerks of Court § 7—

Under the 1949 amendment to G.S. 50-13 (Ch. 1010, Session Laws of 1949) either parent may institute a special proceeding to obtain custody of his or her child in cases not theretofore provided for by this statute or G.S. 17-39, and this amendment authorizes a special proceeding by the mother of an illegitimate child to obtain its custody from her aunt, with whom she had entrusted the child, and thus restricts the jurisdiction of the Juvenile Court in such instances, G.S. 110-21, *et seq.*

2. Judges § 2b: Parent and Child § 4a: Habeas Corpus § 3—

A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. G.S. 7-58; G.S. 7-65.

3. Parent and Child § 4a: Habeas Corpus § 3: Appeal and Error § 37—

Where the mother of an illegitimate child, after her marriage to a person not its father, institutes *habeas corpus* proceedings against her aunt with whom she had left the child, to regain its custody, and the respondent files answer and thus makes a general appearance and at no time challenges the jurisdiction of the court, the Supreme Court, in its discretion, will treat the petition as a special proceeding under G.S. 50-13, and consider the appeal on its merits.

4. Appeal and Error § 40d—

The Supreme Court is not bound by a finding which is based on a conclusion of law.

5. Parent and Child § 9—

The acts of a mother of an illegitimate child in taking the child with her to live with her aunt and in leaving the child with her aunt upon her subsequent marriage to a person other than the father of the child, even though done with an accompanying statement that she waived right to further claim, *is held* not an abandonment of the child in law.

6. Parent and Child § 4a—

Where the mother of an illegitimate child takes it with her to live with her aunt, and upon her subsequent marriage to a person not the father of the child, leaves the child with her aunt, *held:* the mother is entitled to regain custody of the child from the aunt in proceedings instituted for this purpose upon the court's finding that the mother is a woman of good character and has a home proper and fit for the child to visit, notwithstanding that the aunt may be able to provide a more advantageous environment, the natural right of the mother to the custody of the child being paramount in the absence of a showing of unfitness.

IN RE CRANFORD.

PETITIONER'S appeal from *Sharp, Special Judge,* September Term, 1949, RANDOLPH Superior Court.

The petitioner brought a *habeas corpus* proceeding for the purpose of regaining the custody of her illegitimate child whom she alleges she had entrusted to the care of an aunt, Mrs. W. O. Marsh. Shortly after the birth of the child she came to live in the home of her aunt and lived there with the child until her marriage to a person not the father of her child. She then left to live elsewhere, leaving the child in the custody of the aunt, as petitioner says, to remain while she was good to him, but as respondent says, as an unqualified surrender of custody and control, declaring that she would make no further claim. There was no adoption.

The matter came in due course to be heard by Judge Sharp, who heard evidence, made a finding of facts in which she found that the mother had abandoned the child by surrendering him to the unqualified custody of the aunt and asserting that she would make no further claim. She further found that the respondent is a woman of good character and is a fit person to have the custody of the child and that her home is a proper and fit place to rear it; that the mother of the child at the present time is a woman of good character and her home is a proper and fit place for the child to visit.

The order provides that the custody and the control of the child be awarded to the respondent and that the petitioner be allowed to visit the child at stated periods which shall not conflict with its school attendance; and that petitioner shall be allowed to have the child visit her on alternate week-ends.

The petitioner excepted to the finding of fact that she had abandoned the child and that it was to the best interest of the child that he remain in custody of the respondent; and to other findings on which the award of custody was based; excepted to the order, and appealed.

Spence, Smith & Walker for petitioner, appellant.
Miller & Moser for respondent, appellee.

SEAWELL, J. The petitioner, having suffered an adverse decision below, now makes an *ore tenus* objection to the jurisdiction of the trial court, and moves to dismiss the proceeding, intending, we understand, to bring her grievance to the Juvenile Court (G.S. 110-21 to -44) as a court having exclusive jurisdiction of the subject matter. This brings up the necessity of clarifying the jurisdiction, *in limine,* in order to see whether, with procedural propriety, we can reach decision on the merits.

Prior to the creation of the Juvenile Court *habeas corpus* was the recognized procedure for determining the custody of a child in the factual situation presented in this case, and was in common use. *Ashby v. Page,*

106 N.C. 328, 11 S.E. 283; *Latham v. Ellis,* 116 N.C. 30, 20 S.E. 1012; *In re Jones,* 153 N.C. 312, 69 S.E. 317; *Thompson v. Thompson,* 72 N.C. 32. Statutory exceptions and practice existing in certain relationships of parties, not obtaining here, did not, of course, affect the procedure.

In the creation of the Juvenile Court the Legislature gave it exclusive jurisdiction of the custody of children in certain categories set out in G.S. 110-21, in 1, 2, 3, order, including delinquency, parental neglect, abandonment, and other conditions detrimental to the welfare of the child. And, by a sweeping *addendum* in division 3, *supra,* extended such jurisdiction to all cases where the custody of children is involved, rendering the proceeding by *habeas corpus* unavailable. *In re Coston,* 187 N.C. 509, 122 S.E. 183; see *In re Tenhoopen,* 202 N.C. 223, 224, 162 S.E. 619. This is thoroughly discussed in its relation to *habeas corpus* in *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906, which see. We may say now, since it is no longer law, that this provision was scarcely germane to the general tenor and purpose of the act, and put the natural rights of the parents who must resort to it in some jeopardy by its social implications, paramounting the interest of the State.

For this reason (or some other—we need not inquire), there was enacted Chapter 1010, Session Laws of 1949, (to which counsel seem not to have been advertent), making certain amendments to another statute, (G.S. 50-13), which, upon analysis, will be found to apply to the present controversy, and strictly affects the cited provisions of the statute. The amending provision rewrites the first section of G.S. 50-13, making it read as follows:

> "Provided, custody of children of parents who have been divorced outside of North Carolina, and controversies respecting the custody of children not provided for by this Section or Section 17-39 of the General Statutes of North Carolina, may be determined in a special proceeding instituted by either of said parents, or by the surviving parent if the other be dead, in the Superior Court of the county where the petitioner, or the respondent or child at the time of filing said petition, is a resident."

Examination of G.S. 50-13 and G.S. 17-39 discloses that neither of them, before amendment, made any provision for the custody of children under the factual situation or relationships involved in the case before us; and this remedy (Chap. 1010, Session Laws of 1949) was open to the petitioner when she mistakenly sued out *habeas corpus.*

The question arises whether, the remedy by *habeas corpus* having been completely eclipsed by the Juvenile Court jurisdiction, the act amending G.S. 50-13 has not revived it as an alternate remedy.

It certainly destroys the exclusiveness of the Juvenile Court in the premises, but it apparently does more. Considering the history of the legislation, and its intendments, we think the better view is that it provides a new and exclusive procedure for determining the custody of the child covering cases not coming within the exceptive provisions of the amendment, and hence inclusive of the case under review.

We now come to consider the jurisdiction of the hearing court from another angle.

Judge Sharp is a Special Judge. The record shows that she heard the matter at and during a regular term of Randolph Superior Court under a proper commission. Statutes delineating the jurisdiction of Special Judges have broadened that jurisdiction in close, if not final, approximation to that of "regular or elective judges" while holding the court to which they are assigned. *Shephard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445. Considering *in pari materia* the statutes covering the jurisdiction of judges with reference to the jurisdiction of special proceedings of this nature, especially G.S. 7-58 and 7-65, we are of the opinion that a special judge has concurring jurisdiction of matters of this kind with the resident judge and regular judge holding the courts of the district, if heard and completed, and judgment rendered, pending the duration of the court which such judge is commissioned to hold.

The petition in *habeas corpus* adequately set up the grievance complained of with all its essentials, and the answer of the respondent was correlative. By filing such answer she made a general appearance and did not at any time challenge the jurisdiction. In form and substance the petition is hardly distinguishable, except in name only, from the special proceeding contemplated in the statute. The Court will, therefore, in its discretion, treat the petition as a petition in a special proceeding under the statute and consider the appeal on its merits.

The Appellate Court is not bound by the findings of fact that the petitioner abandoned her child by entrusting her custody to her aunt, even though it may have been with an accompanying statement that she waived right to further claim. That is not the legal significance of abandonment in the statutes which have dealt with it as a basis of judicial jurisdiction, and we do not think it is in accord with its moral intendment where disposition of a child is concerned.

There was no adoption here, and respondent had no legal right to the possession of the child. *In re Shelton,* 203 N.C. 75, 79, 164 S.E. 322. As against the natural right of the mother she had only such defense as might be hers in consideration of the welfare of the child and the fitness

or suitability of the claimants of the custody. In this respect the judge, as above stated, found as follows:

> "That the respondent Mrs. W. O. Marsh is a woman of good character and is a fit person to have the custody of said child, and that her home is a proper and fit place in which to rear said child; that the mother of the child at the present time is a woman of good character and her home is a proper and fit place for the child to visit."

On this finding establishing the fact that the woman is now of good character and her home a fit place for the child to visit or spend alternate week-ends, the award of custody of the child to the aunt cannot be sustained.

Where the fitness of the petitioner is unchallenged the natural right of the parent to the custody of the child cannot be denied because a more suitable custodian or a more advantageous environment is available, or because at sacrifice of parental right the child may have a better chance in life, and the "interest of the State" be protected. In a similar situation in *In re Shelton, supra,* the Court says as controlling the decision:

> "As there is no finding of fact that the petitioner is not a suitable person to have the custody and control of her child, she has not forfeited her natural and legal right to such custody and control. It is well settled as the law of this State that the mother of an illegitimate child, if a suitable person, is entitled to the care and custody of the child, even though there be others who are more suitable. *Ashby v. Page,* 106 N.C. 328, 11 S.E. 283. As it appears from the findings of fact made by the court that the petitioner has not been deprived of her legal right to the custody of her child by a valid order of adoption by the respondents and has not forfeited such right by a wilful abandonment of the child, and is a suitable person to have its care and custody, there is error in the judgment awarding the custody of the child to the respondents."

We observe here that the question of unsuitability is one which must be advanced and shown by the respondent. The finding here has negatived such condition.

There is nothing that tears at the heart more pathetically than separation from a child over whom one has watched, has cared for and loved during the years until it has become a part of the very life; but the natural right of a parent, whose unfitness has not been shown, to the custody of a child given to it by a higher power is fundamental, intimately concerned with the integrity of the oldest and most sacred human institution, the home, the family; and we dare not say upon the evidence

and findings before us that social considerations or the superior suitability of another custodian should be of such paramount consideration as to defeat that right.

The judgment of the court below is

Reversed.

WELLINGTON-SEARS COMPANY, INC., v. KERR BLEACHING & FINISHING WORKS, INC.

(Filed 9 November, 1949.)

1. Bailment § 1—

Where the owner delivers goods to another for processing at a fixed price and return to the owner, the contract is one of bailment for mutual benefit.

2. Bailment § 8—

Admissions or proof that bailor delivered goods in good condition to bailee and that they were damaged by fire while in the bailee's possession, establishes a *prima facie* case entitling bailor to go to the jury in the absence of some fatal admission or confession on its part.

APPEAL by plaintiff from *Rudisill, J.*, at June Term, 1949, of CABARRUS.

Civil action to recover damages to goods of plaintiff allegedly negligently caused by fire while in possession of defendant as bailee pursuant to a written contract.

Plaintiff alleges in its complaint these facts in summary: That on or about 31 December, 1946, plaintiff delivered to defendant eight bales of cotton drill material it owned, and defendant accepted same pursuant to a contract and understanding between them, whereby defendant was to process the material for a fixed price to be paid by plaintiff, and return same to plaintiff in good, merchantable and usable condition; that on or about said date said material was damaged by fire while it was in possession and on the premises of defendant in Concord, North Carolina; that defendant failed to exercise that care for the protection of said material required of it as a bailee, and through its own negligence destroyed same, and failed to return it to plaintiff in good merchantable and usable condition as it had contracted and agreed to do, all to plaintiff's great damage as thereinafter set forth, and "that plaintiff is informed and so believes that the damage to the aforesaid material by fire was proximately caused by the negligence of defendant, acting by and through its agents, servants and employees," in that: Defendant (a) failed (1) "to exercise reasonable care in the handling of said material so that said material became

ignited"; and (2) "to properly safeguard said material and take reasonable precautions to prevent said material from becoming ignited while in its possession"; and (b) "carelessly and recklessly caused said material to become ignited."

Defendant, answering the complaint of plaintiff, admits that on or about 31 December, 1946, plaintiff owned certain eight bales of cotton drill material, which had been delivered to and accepted by, and was in possession of defendant, pursuant to a written contract; and that on or about said date the aforementioned bales of material were damaged by fire while in the possession of defendant on premises of the defendant in Concord, North Carolina; but denies all allegations of negligence.

And for further answer and in bar of plaintiff's right to recover, defendant avers: That the relationship between plaintiff and defendant with reference to the goods referred to in the complaint is determined by the provisions of a written contract, No. 2846, dated 20 February, 1946, among which is this provision: "All goods at our plant are at your risk of damage by fire or sprinkler leakage and all other casualties while in transit or in our possession. Insurance rate at our plant is one-tenth of one per cent. We will insure upon request, duly acknowledged by us"; and that plaintiff did not request defendant to insure said goods, and defendant did not insure same.

On the trial in Superior Court it was stipulated and agreed by plaintiff and by defendant, through counsel, among other things, "that upon receipt of the involved material, the defendant placed same in its warehouse known as the old Buffalo Mill; that on the 31st day of December, 1946, at approximately 3:30 P. M., said material was loaded into a box car of the Southern Railway Company by employees of the Kerr Bleachery; that the Southern Railway Company moved said box car on said date a distance of approximately half a mile to a siding at the defendant's main plant in Concord, N. C.; that around 11:30 o'clock P. M. on the same date the material was discovered to be on fire; and that the aforementioned goods were received and accepted by defendant pursuant to a price quotation No. 2846, dated 20 February, 1946, addressed to plaintiff, subject to the terms and conditions appearing on said price quotation, a copy of which is attached to the answer.

And on such trial plaintiff first offered in evidence the admissions made by defendant in its answer as hereinabove stated. Then one C. L. Miller, as witness for plaintiff, testified: "As assistant chief of the Concord Fire Department at 11:40 P. M. on December 31, 1946, I received a call and we went to the Kerr Bleachery and found a box car on fire. The box car was on a side-track on property of Kerr Bleachery between two mills. It was necessary to go through a mill to get to the car. On arrival I could see nothing but smoke. The box car was opened under my super-

vision. I don't recall whether it was sealed. The box car was hard to open and we used a crowbar. Two or three or four feet inside of the door, cloth and the side of the box car were on fire. The fire appeared to be from the inside. There was no evidence of fire from the outside. A good bit of the cloth had caught on fire."

And one Clifford Cress, also witness for plaintiff, testified: "I am a volunteer fireman and was present with Mr. Miller at the time of the fire which he described. When we got there we saw smoke coming out of the box car. The doors were shut. I couldn't say whether there was a seal on the box car. The door was opened with a crowbar. I did not see any fire burning from the outside. The fire was on the inside about 2 feet from the door on the left side at the bottom of the floor."

Thereupon plaintiff rested its case, and defendant entered motion for judgment as of nonsuit. The motion was allowed. And from judgment in accordance therewith, plaintiff appeals to Supreme Court and assigns error.

Taliaferro, Clarkson & Grier and John Hugh Williams for plaintiff, appellant.

Hartsell & Hartsell for defendant, appellee.

WINBORNE, J. This action is predicated upon a bailment for the mutual benefit of plaintiff and defendant. The relation of plaintiff and defendant, in respect thereto, is that of bailor and bailee. The action is founded on negligence. The question, therefore, is whether the evidence introduced by plaintiff, plus the facts stipulated by the parties, is sufficient to withstand a motion for judgment as of nonsuit. The trial judge did not think so, and so ruled. But this Court entertains a contrary view, and holds that it is sufficient to take the case to the jury.

The factual situation thus presented is so nearly identical with that in the case of *Hutchins v. Taylor-Buick Co.*, 198 N.C. 777, 153 S.E. 397, the decision here turns upon the decision there. And the facts stipulated are not so complete as to justify a holding that, as a matter of law, the *prima facie* case, relied upon by plaintiff, is explained away.

Thus, as stated in the *Hutchins case,* "in the absence of some fatal admission or confession, as against a demurrer to the evidence, or motion to nonsuit, a *prima facie* showing carries the case to the jury."

Hence on the authority of the case of *Hutchins v. Taylor-Buick Co., supra,* the judgment below is

Reversed.

LESTER RAYNOR AND L. F. EDENS, ON BEHALF OF THEMSELVES AND ALL OTHERS HAVING AN INTEREST IN THE EDENS COMMUNITY CEMETERY OR BURIAL GROUND, v. S. A. OTTOWAY.

(Filed 9 November, 1949.)

1. Highways § 11—

Where it is controverted whether the road in question was used permissively as a way to a private cemetery or whether it was used by the public under claim of right to a community cemetery, petitioners are not entitled to have it adjudicated a neighborhood public road solely upon a finding by the jury that it was constructed or reconstructed with employment relief funds under the supervision of the Department of Public Welfare. G.S. 136-67.

2. Same—

Testimony that relief funds were used under authorization of the Department of Public Welfare on a cemetery project, and that the supervisor in charge of the work, upon suggestion of an interested worker, had the workers improve the road to the cemetery, *is held* insufficient to establish that the reconstruction of the road was authorized or directed by the Department of Public Welfare within the meaning of G.S. 136-67.

3. Same—

Evidence of the prescriptive use of a road across defendant's land under claim of right entitles petitioners to go to the jury in a proceeding to establish the way as a neighborhood public road.

APPEAL by respondent from *Edmundson, Special Judge,* May-June Term, 1949, ONSLOW. New trial.

Petition to have a cartway declared a neighborhood public road.

A burial ground known as Edens Cemetery is located on the land now owned by respondent. A cartway leading from the public road to the cemetery has been in existence for many years, perhaps a hundred. Defendant built a fence across the road, thereby blocking it. Thereupon, the petitioners instituted this action.

They allege that the cemetery is a community burial ground and the cartway is and has been for many years a neighborhood driveway; that both have been generally used by the community; and that in 1933 or 1934 the cartway was repaired and reconstructed with unemployment relief funds under the supervision of the superintendent of public welfare. They pray that the cartway be adjudged a neighborhood public road to remain open and unobstructed at all times for the use of the community in traveling to and from the cemetery.

The defendant, answering, admits that he has built a fence across said cartway to prevent the use thereof and alleges that there are other ways to the cemetery. He asserts further that the cemetery is a private, family

burial ground in which members of his family have been interred, from time to time, for several generations, and that the cartway is a private way over his land to said burial ground.

During the trial the court announced there was only one issue to be submitted to the jury, to wit:

"Has the road in question been laid out, constructed or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare?"

The jury answered the issue in the affirmative. From judgment thereon as appears of record, the respondent appealed.

Warlick & Ellis for petitioner appellees.

W. K. Rhodes, Jr., for respondent appellant.

BARNHILL, J. The verdict of the jury is not sufficient to support the judgment.

The Edens Cemetery is on the land of defendant. There is testimony tending to show that it is a private burial ground and that the cartway from the public road to the cemetery is a private way used at times by the community, with the consent of respondent, and that such use is not, and has never been, hostile to respondent or his predecessors in title. Thus it appears that the nature both of the burial ground and the pathway was at issue.

The statute (G.S. 136-67) does not contemplate that a private way shall be converted into a neighborhood public road by the mere use of relief funds in its reconstruction.

The Act, c. 183, P.L. 1941, now G.S. 136-67, constitutes a legislative definition of neighborhood public roads and reads as follows:

"All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the State Highway and Public Works Commission, but which remain open and in general use by the public, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare, and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city . . . which serve a public use . . . are hereby declared to be neighborhood public roads . . .: *Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use.*" (Italics supplied.)

While the cartway across defendant's land to the burial ground has been used for many years, it has not been judicially determined whether this was by permission of the owner or under claim of right such as would

create an easement. Nor has it been determined that the burial ground is a community and not a private cemetery.

In the absence of a finding that the cartway serves a public rather than a private use—that it is a neighborhood way to community cemetery and not a private way to a family burial ground—the judgment cannot be sustained.

Furthermore, it is not made to appear that the way was reconstructed with unemployment relief funds under the supervision of the department of public welfare.

The director of the Emergency Relief Association of the county who had control of relief funds was a witness for the plaintiffs. He testified that there was a relief project known as Edens Cemetery project, that there was no road project and no road was mentioned when the work on the cemetery was authorized. While the men were working on the cemetery, the overseer or supervisor in charge of the laborers, one of the petitioners here, asked the defendant: "How about taking them men and cleaning out the ditch bank and throwing the dirt up in the road and building up the road?" The defendant assented and the suggested work was done. The workmen were paid out of relief funds. Thus the repair of the road was incidental to the cemetery project. Use of the funds for that purpose was not authorized or directed by the Department of Public Welfare, but they were expended in the discretion of the party in charge of the workmen. This falls short of proof that the road was reconstructed under the supervision of the Department of Public Welfare.

There is, however, evidence of prescriptive use of the road across the defendant's land. The petitioners, if they are the parties interested, are entitled to have this view of the case submitted to the jury. To that end the cause is remanded for a

New trial.

MRS. CARRIE O. JORDAN v. E. T. MAYNARD, TRADING AS MAYNARD'S FLOOR SHOP, AND PENNSYLVANIA THRESHERMAN & FARMERS MUTUAL CASUALTY INSURANCE COMPANY.

(Filed 9 November, 1949.)

1. Contracts § 5: Insurance § 48—

Promise to the injured person made by the carrier of liability insurance that insurer would pay all hospital and medical expenses, *is held* without consideration and unenforceable.

2. Pleadings § 19b—

In a suit against the owner of the store in which plaintiff was injured and the carrier of liability insurance for the owner, demurrer for mis-

joinder of parties and causes is improperly granted when the complaint fails to state a cause of action against insurer, and the cause will be remanded to the end that it be dismissed as to the insurer and retained for trial against the store owner, after granting plaintiff time in which to replead.

3. Insurance §§ 43d, 48—

A policy of liability insurance is for the protection and indemnity of insured, and neither by express terms nor underlying purpose is it made for the benefit of third parties, and, in the action by the injured person against insured, all reference to liability insurance is prejudicial, and all such references should be stricken from the complaint.

APPEAL by defendants from *Stevens, J.*, May Term, 1949, WAKE. Error and remanded.

Plaintiff, a customer in the store of defendant Maynard, sat or attempted to sit in a chair provided for customers. The chair slipped or skidded out from under her, causing certain personal injuries. She makes allegations of negligence in the construction of the chair and the condition of the floor.

Thereafter, a claim adjuster or agent of the defendant insurance company informed the plaintiff that it carried insurance upon the defendant Maynard to protect him against liability for such injuries as she had sustained, and that it desired the plaintiff to have all necessary and proper medical, surgical, hospital, and nursing treatment on account of her said injuries, and that it would pay the expense of the same. Subsequent thereto she incurred hospital, doctors' and nurses' bills.

Plaintiff now prays recovery against both defendants for the injuries sustained and the expenses incurred. Each defendant demurred for misjoinder of parties and causes of action. The demurrers were overruled and defendants appealed.

Simms & Simms for plaintiff appellee.

Smith, Leach & Anderson for defendant appellants.

BARNHILL, J. The defendant insurance company, in this Court, interposed demurrer *ore tenus* for that the complaint fails to state a cause of action against it in that the alleged promise by its agent, if made, was without consideration and is therefore unenforceable. The demurrer is well advised and must be sustained. *Stonestreet v. Oil Co.*, 226 N.C. 261, 37 S.E. 2d 676.

So far as this record discloses, the insurance company was under no contractual duty to plaintiff to provide hospital and medical care for her. The assurance of its claim adjuster or employee that the company would pay the expenses of hospitalization including the charges of the

doctors and nurses was voluntary and without consideration. Hence, aside from the question of authority, which is not now at issue, it imposed no liability enforceable in a court of law.

Since no cause of action is stated as against the defendant insurance company, there is no misjoinder of parties and causes of action. *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295.

In an action *ex delicto* for damages proximately caused by the alleged negligence of the defendant, his liability insurance carrier is not a proper party defendant. *Clark v. Bonsal,* 157 N.C. 270, 72 S.E. 954; *Johnson v. Transfer Co.,* 204 N.C. 420, 168 S.E. 495; *Scott v. Bryan,* 210 N.C. 478, 187 S.E. 756. The contract is made for the protection and indemnity of the insured, fortifying him against unexpected and uncertain demands which might otherwise prove disastrous to him. Neither by express terms nor underlying purpose is it made for the benefit of third parties.

It is so alien to a cause of action, such as the one here alleged, that evidence thereof or reference thereto in the presence of the jury is prejudicial. *Stanley v. Lumber Co.,* 184 N.C. 302, 114 S.E. 385; *Featherstone v. Cotton Mills,* 159 N.C. 429, 74 S.E. 918; *Luttrell v. Hardin,* 193 N.C. 266, 136 S.E. 726. The presiding judge should at all times "guard against prejudicial references to liability insurance." *Scott v. Bryan, supra,* and cases cited.

It follows that the defendant insurance company is an improper party defendant and all reference to it and to liability insurance should be eliminated from the complaint. To that end the court below will allow the plaintiff reasonable time within which to redraft her pleading.

The cause is remanded to the end that an order may be entered dismissing the action as to the defendant insurance company and granting plaintiff time in which to replead. The cause must be retained on the civil issue docket for trial as against the defendant Maynard. It is so ordered.

Error and remanded.

EDWARD M. TERRY v. CAPITAL ICE & COAL CO.

(Filed 9 November, 1949.)

1. Appeal and Error § 40a—

A sole assignment of error to the signing of the judgment presents only the question whether error appears on the face of the record.

2. Appeal and Error § 40f—

The denial of a motion to strike certain allegations from the pleadings will ordinarily be affirmed on appeal when the matter can best be determined by rulings on the evidence.

APPEAL by defendant from *Grady, Emergency Judge,* September Term, 1949, of WAKE.

Civil action to recover damages arising out of a collision between plaintiff's automobile and defendant's truck at the intersection of Branch and Bloodworth Streets in the City of Raleigh.

It is alleged that at the time of the collision on 14 December, 1948, the defendant's truck was being operated by an incompetent, reckless and unreliable colored boy, without driver's license, under the express direction and control of defendant's agent and driver, with the knowledge and consent of the defendant, actual or constructive.

In apt time, the defendant moved to strike from the complaint all the allegations pertaining to the actual operator of the truck as referring to its non-agent and being inapplicable, improper and prejudicial.

The motion was overruled, the court being of opinion that the more appropriate procedure would be to determine the matter at the hearing on rulings pertaining to the competency and sufficiency of the evidence. From this order, the defendant appeals, assigning as error "the signing of the foregoing judgment."

Mordecai & Mills for plaintiff, appellee.

A. J. Fletcher and F. T. Dupree, Jr., for defendant, appellant.

STACY, C. J. The single imputed error "in signing the judgment," presents only the question whether error appears on the face of the record.

While extraneous matters in a pleading may invite or attract a motion to strike, this does not put the pleader in a strait-jacket in respect of pertinent allegations. *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308. Nor is it the province of an appeal in such cases to have this Court chart the course of the trial in advance of the hearing. There seems little or nothing extraneous in the present complaint when viewed in the light of the apposite decisions on the subject. *Reaves v. Power Co.,* 206 N.C. 523, 174 S.E. 413; *Dover v. Mfg. Co.,* 157 N.C. 324, 72 S.E. 1067; *Cotton v. Transp. Co.,* 197 N.C. 709, 150 S.E. 505; *Russell v. Cutshall,* 223 N.C. 353, 26 S.E. 2d 866.

In addition, the reasons assigned by the trial court, bring the case clearly within the principle of *Parker v. Duke University,* 230 N.C. 656, 55 S.E. 2d 189. The case is controlled by the decision in that case.

Affirmed.

C. E. FORD v. FORD MOULDING COMPANY, A CORPORATION OF NORTH CAROLINA, AND FORD METAL MOULDING CORPORATION, A CORPORATION OF NEW JERSEY.

(Filed 9 November, 1949.)

Ejectment §§ 1, 7—

Evidence that the relationship of landlord and tenant existed between the parties and that defendants were holding over after the expiration of the term is sufficient to take the case to the jury and support judgment for plaintiff in summary ejectment, and defendants' claim in respect to improvements is outside the scope of the proceeding and not justiciable therein. G.S. 42, Art. 3.

APPEAL by defendants from *Burgwyn, Special Judge,* at April-May Civil Term, 1949, of FRANKLIN.

Civil action in summary ejectment instituted 9 April, 1949, for the possession of certain land and building thereon in Franklin County, North Carolina, heard in Superior Court on appeal thereto from judgment entered in the court of a justice of the peace of said county.

Upon the trial in Superior Court the plaintiff offered in evidence a written lease dated 20 January, 1948, by the terms of which plaintiff and his wife, as lessors, leased to defendant, Ford Metal Moulding Corporation, organized and existing under the laws of the State of New Jersey, as lessee, a certain parcel of land, together with the buildings and other improvements thereon situate, in the town of Louisburg, Franklin County, North Carolina, for one year beginning 15 March, 1948, and continuing until 15 March, 1949, at a fixed rental. The lessee was given option to purchase the property at any time during the term of the lease. And the evidence for plaintiff shown in the record tends to show that the lessee did not exercise its option to purchase, and that the term of the lease expired 15 March, 1949, and that then plaintiff demanded possession of the property.

Defendants, in evidence offered on the trial, do not claim that the option was exercised, and admit the existence and terms of the written lease and possession of the premises, and that Ford Moulding Company is sublessee. But they offer evidence tending to show negotiations for continuance of the lease, without avail, and that the lessee had expended large sums of money in preparing the building for the purposes for which it was leased, the removal of which plaintiff forbids.

The jury returned verdict that plaintiff is the owner and entitled to the possession of the premises described in the affidavit on which summons issued. Thereupon the court entered judgment declaring that defendants are in the wrongful possession thereof, and ordering that they be removed therefrom and plaintiff be put in possession thereof.

Defendants appeal to Supreme Court and assign error.

Malone & Malone and Yarborough & Yarborough for plaintiff, appellee.

Edward F. Griffin for defendants, appellants.

WINBORNE, J. Defendants challenge the jurisdiction of a court of a justice of the peace in this proceeding, and assign as error the denial of their motions for judgment as of nonsuit.

The jurisdiction of a justice of the peace in civil action for recovery of possession of real estate is entirely statutory, and is derived from the landlord and tenant act providing for summary ejectment. Article 3 of Chapter 42 of the General Statutes of North Carolina. Such jurisdiction may be exercised only in cases where the relationship of landlord and tenant existed within the terms and meaning of this act, and where the tenant holds over after the expiration of the term. See *Simons v. Lebrun,* 219 N.C. 42, 12 S.E. 2d 644, and cases there cited.

Testing the evidence in the present case by this principle it is clear that the relationship of landlord and tenant existed between plaintiff as lessor and defendant, Ford Metal Moulding Company, as lessee, and that the lessee holds over after the expiration of the term fixed by the written lease. Hence the court of a justice of the peace would have jurisdiction as to who is entitled to the possession. This is the question presented here.

But on the record on this appeal, the rights of the parties in respect of improvements, if any, put upon the property by lessee, whatever may be their nature and character, are not presented,—and as to such rights we make no decision.

However, on this record it would seem, after due consideration of the questions presented, that there is sufficient evidence to take the case to the jury and to justify and support the verdict rendered. Hence in the judgment below, we find

No error.

STATE v. W. H. BRYANT.

(Filed 9 November, 1949.)

1. Criminal Law § 29b—

In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously like tickets had been found in defendant's home, *is held* competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as

supporting the State's view that defendant was engaged in operating a lottery.

2. Criminal Law § 53b—

A charge that reasonable doubt is one growing "out of the evidence" will not be held for prejudicial error when immediately thereafter the court instructs the jury that, if after considering all the evidence, the jury did not have an abiding conviction of defendant's guilt to a moral certainty, then the jury would have a reasonable doubt.

APPEAL by defendant from *Williams, J.*, March Term, 1949, of WAKE. No error.

The defendant was charged with operating a lottery and with having in his possession a quantity of numbers tickets, in violation of G.S. 14-290 and G.S. 14-291.1. The jury returned verdict of guilty as charged, and from judgment imposing sentence the defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

W. H. Yarborough for defendant, appellant.

DEVIN, J. There was evidence on the part of the State that 29 January, 1949, a police officer went with one Ivy Riddick to the latter's home, and found the defendant in a room therein and close by in a heater a quantity of tickets, or pieces of paper marked with numbers, which the officer testified were "butter and egg" lottery tickets. Apparently the defendant had unsuccessfully attempted to burn the tickets. Riddick testified he had at the direction of defendant delivered the tickets to him there. The officer also testified, over objection, that he had shortly before visited the defendant in his home and found therein lottery tickets of the same kind and type. Defendant's objection to this testimony cannot be sustained since it throws light on defendant's intent, guilty knowledge, system, and tends to show defendant's purposeful possession of the lottery tickets where found, as well as supporting the State's view that defendant was engaged in operating a lottery. *S. v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853; *S. v. Edwards,* 224 N.C. 527, 31 S.E. 2d 516.

The defendant assigns as error that the court in charging the jury defined reasonable doubt as one "growing out of the evidence in the case and supported by common sense and reason," citing *S. v. Tyndall,* 230 N.C. 174, 52 S.E. 2d 272, and *S. v. Braxton,* 230 N.C. 312, 52 S. E. 2d 895, where it was pointed out that a reasonable doubt may arise out of a lack of evidence or from its deficiency. However, we observe that immediately following the use of the language complained of, the court instructed the jury, "If, after considering, comparing and weighing all

the evidence in the case you cannot say you have an abiding conviction to a moral certainty of defendant's guilt, then you have a reasonable doubt about it, otherwise not." Considering the entire charge of the court as to the burden of proof and in defining reasonable doubt, we conclude that the defendant's exception on this ground cannot be sustained. *S. v. Wood,* 230 N.C. 740, 55 S.E. 2d 491. It may be noted that this case was tried below before the decisions in the *Tyndall* and *Braxton cases* were issued.

In the trial we find

No error.

HARRY E. HOLLINGSWORTH v. RICHARD GRIER.

(Filed 9 November, 1949.)

1. Negligence § 16—

In negligent injury actions, demurrer on the ground of contributory negligence should not be sustained unless such negligence appear patently and unquestionably upon the face of the complaint.

2. Automobiles §§ 8d, 18a—

The complaint alleged that plaintiff was driving his car on his right side of the highway on a cloudy, foggy and rainy night, when he suddenly came upon defendant's car which was parked without lights in his lane of traffic, and that immediately upon seeing the parked vehicle, plaintiff swerved his car to the left, but did not have time to avoid the collision. *Held:* Defendant's demurrer should have been sustained on the ground that contributory negligence appeared patently and unquestionably upon the face of the complaint.

APPEAL by defendant from *Bennett, Special Judge,* August Term, 1949, of CABARRUS.

Civil action to recover damages arising from a rear-end collision with defendant's automobile alleged parked on the highway.

The gist of the complaint follows:

3. That on the 21st day of January, 1949, about 7 p.m. the plaintiff was operating his automobile in a northern direction on Highway 29, about 200 yards north of Lowe's Trading Center in Kannapolis at a rate of speed of 30 to 35 miles per hour in his right-hand lane of said highway on a slight downgrade, the weather being cloudy and foggy with a light drizzle of rain falling, when he suddenly came upon the automobile of the defendant parked directly in his lane of traffic without any lights.

4. That immediately upon seeing the automobile of the defendant parked directly in the middle of the right-hand lane of said highway, the

plaintiff swerved his car to the left as far as he possibly could within the limit of time and space but was unable to avoid collision with the automobile of the defendant which said collision caused the damages hereinafter alleged.

The defendant interposed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, in that upon the face of the complaint, the plaintiff's contributory negligence is manifest and apparent. The defendant also moved for judgment on the pleadings.

From judgment overruling the demurrer and denying the motion for judgment on the pleadings, the defendant appeals, assigning error.

J. Laurence Jones, C. M. Llewellyn and Sam H. Wilds for plaintiff, appellee.

Hartsell & Hartsell for defendant, appellant.

STACY, C. J. The question for decision is the sufficiency of the complaint to survive the demurrer. The trial court thought it good as against the challenge. We are inclined to a different view.

True it is, a complaint may not be overthrown by demurrer on the ground of the plaintiff's contributory negligence unless such negligence appear patently and unquestionably upon the face of the complaint. *Ramsey v. Nash Furn. Co.,* 209 N.C. 165, 183 S.E. 536. But here, we think such negligence does so appear on the face of the complaint. The plaintiff says he saw the defendant's automobile too late to avoid a collision. This was negligence on his part which contributed to the injury, as he was evidently "outrunning his headlights" or inattentive to his own safety. Note the allegation is not that the plaintiff was unable to see the defendant's car in time to avoid a collision, but that he did not see it in time. He omits to state whether he was keeping a proper lookout or the collision was without fault on his part. The subject is fully discussed in the following, recent cases: *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Riggs v. Oil Co.,* 228 N.C. 774, 47 S.E. 2d 254; *Bus Co. v. Coble Dairy Products Co.,* 229 N.C. 352, 49 S.E. 2d 623; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355.

No doubt the plaintiff may desire to reform his pleading.

Reversed.

NORTH STATE FINANCE COMPANY v. W. C. LUCK.

(Filed 9 November, 1949.)

Pleadings § 29: Courts § 4c—

Where the clerk renders judgment on the pleadings upon the filing of answer admitting the allegations of the complaint entitling plaintiff to the recovery, and such judgment is affirmed on appeal to the Superior Court, the matter will not be disturbed on further appeal to the Supreme Court, since the Superior Court had jurisdiction to enter the judgment.

DEFENDANT'S appeal from *Sharp, Special Judge,* September Term, 1949, (by consent), RANDOLPH Superior Court.

J. G. Prevette for defendant, appellant.

Ottway Burton for plaintiff, appellee.

PER CURIAM. This action was instituted in Randolph County Superior Court November 30, 1948, to recover judgment on a note for borrowed money in the amount of $1,078.66, with interest, secured by a chattel mortgage on an automobile. Service of summons and complaint was made on defendant on that same day.

The complaint sets up sufficient allegations for recovery upon the declared amount but adds an allegation in the 6th paragraph, ". . . the defendant has fraudulently disposed of the mortgaged property through one of his agents. That the plaintiff has exercised diligence in trying to obtain possession of this automobile, and that it has been unable to do so."

On 29 December, 1948, defendant Luck obtained an order for additional time to file answer to and including the 18th day of January, 1949.

On motion of plaintiff on January 10, 1949, the Clerk of the Superior Court of that county signed a default judgment for plaintiff; the application for extension to file answer had been mislaid by personnel in the Clerk's office. The attorney for the defendant some time later brought it to the attention of the Clerk of the Superior Court that he had obtained an extension of time to file answer and the judgment of January 10, 1949, was withdrawn. The defendant, through his attorney, filed a verified answer on 18 January, 1949 (within the extension of time granted him), admitting all the material allegations of the plaintiff's complaint except the allegation in aforesaid paragraph 6, charging him with fraudulently disposing of the mortgaged property, which he denied.

Upon motion of plaintiff, after notice to the defendant's attorney of record, the Clerk signed a judgment on the pleadings, in favor of the

plaintiff, dated May 17, 1949, for recovery of the amount above stated. The action had not been transferred to the civil issue docket.

Motion by defendant to set the judgment aside was declined by the Clerk of the Superior Court and on appeal to the Superior Court the judgment was affirmed. Defendant appeals to this Court from the judge's order.

Upon the facts stated the Court is of the opinion that the judgment on the pleadings was within the jurisdiction of the judge and a proper exercise of her authority. The judgment of the Superior Court is, therefore,

Affirmed.

MRS. ZENNIE LIDE AND HUSBAND, E. M. LIDE; LUCILE MARR AND HUSBAND, R. W. MARR; WALTER MARLETTE; LAWRENCE K. MEARS; THELMA MEARS HENDERSON AND HUSBAND, K. A. HENDERSON; MARK MEARS AND WIFE, MARGIE MEARS; GERALDINE MEARS FIELDS AND HUSBAND, JAMES LEON FIELDS; MAMIE RUTHER MEARS HALLEY AND HUSBAND, LEONARD B. HALLEY; LINTON NORMAN MEARS AND WIFE, MARY MEARS, AND LAWRENCE K. MEARS, TRUSTEE, v. BERNARD LAWRENCE MEARS, LYNN LAREE MEARS AND MARY VICTORIA MEARS, CHILDREN OF ALTON HORACE MEARS, DECEASED, AND ALL UNKNOWN PERSONS, BY THEIR GUARDIAN AD LITEM, W. R. FRANCIS, AND FLORENCE SADLER.

(Filed 23 November, 1949.)

1. Declaratory Judgment Act § 2c—

The Declaratory Judgment Act does not authorize courts to give advisory opinions or academic legal guidance, but actions for declaratory judgments will lie for an adjudication of rights, status or other legal relations only when there is an actual or existing controversy between the parties. G.S. 1-253.

2. Same: Declaratory Judgment Act § 4—

A litigant seeking a declaratory judgment must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties, but the adverse party cannot confer jurisdiction on the court by failing to demur to an insufficient pleading.

3. Same—

The court acquires jurisdiction to render a declaratory judgment as to those matters concerning which it can be inferred from a liberal interpretation of the pleading that there is an actual or existing controversy between the parties.

4. Trusts § 28—

Where a will gives specific directions that a trust therein created shall terminate twenty years from the date of testator's death, upon expiration

of this twenty year period the *corpus* of the estate passes to the beneficiaries entitled thereto and the offices and duties of the trustees end.

5. Wills § 31—

A will must be construed as it is written.

6. Same—

Where a will, in one item, provides for the distribution of income from property to be held in trust, and by subsequent item directs that upon the termination of the trust the property should be equally divided among the "heirs" of testator's children, *held*, a codicil, amending the first item by making disposition of a parcel of the property in fee, controls, and precludes the division of such parcel among the heirs of testator's children upon the termination of the trust.

7. Wills § 33b—

A devise of one-half interest in realty for life of the beneficiary and at his death "in fee to his bodily heirs" gives the beneficiary the fee simple title to an undivided one-half interest under the rule in *Shelley's case*.

8. Wills § 33c—

A devise of realty in fee with the proviso that if the beneficiary should die without bodily heirs the property should go to another, confers a defeasible fee which is converted into a fee simple absolute upon the death of the beneficiary leaving issue.

9. Same—

Testator devised the land in question to his two granddaughters in fee, defeasible as to each upon her dying without issue living at the time of her death, in which case her share was to go to the survivor. *Held:* The defeasance was contingent upon the happening of two events (1) the death of one beneficiary without issue and (2) the survivorship of the other, and upon the death of one of the grandchildren leaving a child her surviving, the other grandchild takes a fee simple absolute and indefeasible as to the other share, since the second contingency was rendered impossible of happening.

10. Wills § 34b—

Where a will directs that at the termination of the trust therein set up, the property should be "equally divided between the heirs of my children . . . *per stirpes*," the beneficiaries take by right of representation through their respective parents and not as individuals.

11. Wills § 33g—

Testator set up a trust with provision that a specified beneficiary should be entitled to the use of certain property so long as she paid taxes and kept same in repair, but with discretionary power in the trustees to sell the specified property at any time for reinvestment. By another item it was directed the trust should terminate at the end of twenty years from the date of testator's death and the *corpus* be divided as specified. *Held:* The beneficiary did not take a life estate but only a conditional right of occupancy pending sale or termination of the trust, and upon the termination of the trust all her interest in the property ceased.

12. Wills § 33c—

The will in suit set up a trust with provision that at the expiration of twenty years the trust should terminate and the *corpus* be distributed to the heirs of testator's children. *Held:* Upon the death of testator the remainder vested in the children of the son and daughter of testator with the right of enjoyment postponed until the expiration of the twenty years, and their rights are not dependent upon whether or not they survive the twenty year period.

13. Declaratory Judgment Act § 2c—

Where it is not alleged that a prospective purchaser has been obtained for the property in question, the courts will not give an advisory opinion as to the marketability of the title.

14. Infants § 2: Declaratory Judgment Act § 1—

The court may not order that the interests of infant defendants in certain realty be sold in the absence of allegation or evidence that such sale would benefit them. Whether the inherent power of a court of equity to authorize such sales in proper instances may be exercised in proceedings under the Declaratory Judgment Act, *quære?*

APPEAL by defendants from *Moore, J.*, in Chambers, 15 August, 1949, in action pending in the Superior Court of HAYWOOD.

Marcus Jackson Mears died testate in Haywood County, North Carolina, 8 December, 1919, survived by his son, Lawrence K. Mears, and his daughter, Zennie Lide, who are parties to this action.

The two children of Zennie Lide, to wit, Lucile Wells and Cornelia Wells, and the six children of Lawrence K. Mears, to wit, Thelma Mears Henderson, Mark Mears, Geraldine Mears Fields, Mamie Ruth Mears Halley, Linton Norman Mears, and Alton Horace Mears, were living at the death of their grandfather, Marcus Jackson Mears. Lucile Wells and Cornelia Wells afterwards married. The former and her husband, R. W. Marr, are still living, but the latter died at an undisclosed date, survived by an only son, Walter Marlette. Alton Horace Mears also passed from life sometime after 8 December, 1939, leaving a widow, Florence Sadler, who has since remarried, and three children, Bernard Lawrence Mears, Lynn Laree Mears, and Mary Victoria Mears.

The will of Marcus Jackson Mears consists of these two testamentary documents: (1) An original will dated 25 May, 1917, and hereinafter called the will; and (2) a codicil dated 25 September, 1919, and hereinafter designated as the codicil. These documents were before this Court in *Lide v. Wells,* 190 N.C. 37, 128 S.E. 477, a case which did not involve the questions arising on the present appeal.

By the first and second items of the will, the testator put his real property in trust for a term of years from the date of his death for the benefit of his son, Lawrence K. Mears, and his daughter, Zennie Lide. The

original will committed the control of the trust estate to a single trustee, to wit, R. M. Wells, who was also made executor; but the codicil appointed Lawrence K. Mears a co-trustee to act with the "other trustee named in the will in the management of the property." Various items of the will and codicil conferred upon the trustees power to sell particular pieces of the testator's land at specified times during the existence of the trust. The eighth item of the will required the trustees to invest any moneys arising from such sales in Federal and State bonds, and provided that the interest accruing on such bonds would "be disposed of and distributed in the manner set out" in the third item of the will, which is hereinafter quoted. The testator made express stipulations as to the duration and termination of the testamentary trust in the eleventh item of the will and the third item of the codicil. The eleventh item of the will is as follows: "That this trust shall remain in full force and effect for sixty years from the date of my death, at which time my said estate shall be equally divided between the heirs of my children, and they shall receive all of my property, both real, personal and mixed, *per stirpes.*" The third item of the codicil amends the eleventh item of the will by substituting the words "twenty years" for the words "sixty years."

Both R. M. Wells and Lawrence K. Mears accepted the trust and administered it "in accordance with the provisions of said will and codicil." Wells died 17 October, 1941.

The testator was the owner in fee simple of two specific bodies of land in Canton, North Carolina, which were not sold by the trustees. One piece of this realty, which is hereafter called the store property, consists of approximately 5,525 square feet of land containing two brick store buildings, and the other, which is hereafter designated as the hotel property, embraces a hotel building and adjacent vacant land ordinarily used in connection therewith.

The testamentary provisions dealing in express terms with the store property are the third item of the will and the first item of the codicil. By the third item of the will, the testator directed his trustee to take charge of the two brick store buildings in Canton, to lease them, and to pay the net rent accruing on them "to my said son and daughter in the following manner, to wit: One-half to Lawrence K. Mears so long as he uses said funds for the use of his children, their maintenance and education; but in event my son shall fail to apply said funds to the proper support of his said children, then my said Trustee, in his discretion, from time to time, is ordered and directed to pay any funds which may come into his hands, as aforesaid, from my estate, to his said children for their support and maintenance or their heirs in case of the death of his said children, and such an amount as in his discretion seems right, to the said Lawrence K. Mears himself from time to time. My said Trustee, after

paying said necessary expenses of said buildings as hereinbefore set out, shall pay the remaining one-half of said net income from said buildings, as follows: To my daughter, Mrs Zennie Lide, one-third and the remaining two-thirds to my granddaughters, Lucile Wells and Cornelia Wells, and in the event of the death of my daughter, Mrs. Zennie Lide, then each of my said two above named grandchildren are to receive one-third given to my daughter. And in the event of the death of my said grandchildren, Lucile and Cornelia Wells; and the death of my said daughter, then the surviving one is to receive the remaining portion."

The first item of the codicil is as follows: "That the store buildings mentioned in paragraph three of my said Will may be sold on or before ten years after my death by my trustee and Executor; and the one-half interest in said paragraph three given to Lawrence K. Mears, be and the same is hereby changed in this respect, that is, the said Lawrance K. Mears shall have the said one-half interest for and during his natural life, and at his death in fee to his bodily heirs, thereby revoking that portion of said paragraph three which makes it obligatory upon my son, Lawrence K. Mears, to use the income from said property for the maintenance and education of his children. In the portion of said paragraph three which devises and bequeaths to my daughter, Mrs. Zennie Lide, one-third to her and remaining two-thirds to my two grand-daughters, Lucile Wells and Cornelia Wells, be changed in this respect, that is to say, that I will and bequeath to my said daughter, Mrs. Zennie Lide, for life the property therein described and in remainder to my two granddaughters, Lucile Wells and Cornelia Wells, in fee; but in the event of the death of my said grand-children, Lucile Wells and Cornelia Wells, or the death of either of them, without bodily heirs, then in that event the one surviving is to receive the other's portion of said property."

The sixth and seventh items of the will and the fourth item of the codicil make specific reference to the hotel property. The sixth item of the will is as follows: "My said Trustee is hereby authorized and empowered and directed to dispose of my hotel property situate in the Town of Canton, North Carolina, by deed to any purchaser or purchasers . . . at such time as in the discretion of my said Trustee may seem right and proper, and receive the proceeds from said sale and invest the same, after paying all expenses, in the manner hereinafter set out in eighth item of this Will." The seventh item of the original will contains these provisions: "I hereby authorize and direct my said Trustee to lease to my said daughter, Mrs. Zennie Lide, the hotel in which I now live, together with the grounds or lands adjacent thereto, so long as the same remains unsold by my Trustee, for which no charges shall be made to my said daughter, except that she shall from time to time keep the said building and grounds on which said hotel is situate in good repair, pay the

taxes and assessments on the same, and pay the fire insurance premiums and all other necessary expenses to keep said building and lot in as good repair as it is at present, and my said daughter shall pay all repairs, etc., above mentioned until my said Trustee may in his discretion see fit and proper to sell the same as hereinbefore set out, at which time said lease and occupancy shall immediately terminate. And in event my said daughter shall fail to make said repairs, etc., above set out, then my said Trustee is ordered and directed, in his discretion to terminate said lease, and rent said hotel and grounds at the best rental, and the proceeds derived therefrom to be divided as hereinafter set out in item 8 of this Will."

The fourth item of the codicil is in these words: "That the hotel mentioned in paragraph seven of my said Will may be occupied by my daughter, Mrs. Zennie Lide, upon the payment of the taxes and insurance by her; but in the event she does not wish to occupy the same, then my Executor and Trustees are authorized to lease the said building to responsible persons, who have no children, or to persons who will not destroy, deface or impair the value of the property. But in no event shall those occupying said hotel deface or impair the buildings or the grounds; and my Executor may sell the same within two years after my death, and the proceeds arising from the sale thereof, and from the sale of all of my property referred to in this codicil, shall be invested in the manner set out in this my said Will."

The plaintiffs brought this action against the widow and children of the late Alton Horace Mears for the avowed purpose of obtaining a declaratory judgement construing certain provisions of the will and codicil and adjudicating the respective rights of the parties thereunder in the store property and the hotel property. The complaint details the matters and things set forth above. In addition thereto, the plaintiffs allege that they have received an offer for the purchase of the store property; that they are willing to accept such offer, "but some question has been raised as to whether or not a good merchantable title to said property can be conveyed to the proposed purchaser; that by reason thereof they "desire the direction of the Court as to the saleability of said premises and the distribution of the proceeds to be derived from the sale"; that they also desire to sell a specifically described portion of the hotel property, which is vacant and "not necessary to the hotel"; that they desire to be advised by the judgment of the Court as to who are the proper parties to execute title to the store property and the specifically described portion of the hotel property "if they can be sold; whether Lawrence K. Mears, Mrs. Zennie Lide, Mrs. Lucile Marr, and Walter Marlette, or should a Commissioner be appointed to convey said property."

The complaint does not disclose the amount or terms of the offer for the store property, or the name of the person making such offer, or the identity of the person who questions the marketability of the title of the parties to the property. It does not state any proposed conditions for the desired sale of the specifically described portion of the hotel property. Furthermore, neither the complaint nor the answer suggest in any way that any benefit would accrue to the children of the late Alton Horace Mears from the sale of any interests which they may have in the property mentioned in the pleadings.

All of the parties to the action are adults, except the three children of the late Alton Horace Mears. These minors have no general or testamentary guardian, and they defend in this cause through W. R. Francis, their guardian *ad litem*. No issues of fact were raised by the pleadings, and the action was heard before his Honor, Dan K. Moore, the resident judge of the judicial district comprehending Haywood County, in chambers at Sylva, North Carolina. Judge Moore entered judgment, and the defendants excepted thereto and appealed, assigning errors. To avoid tedious repetition, the pertinent provisions of the judgment and the assignments of error are set forth in the opinion which follows this statement of facts.

Smathers & Meekins for plaintiffs, appellees.

W. R. Francis for defendants, appellants.

ERVIN, J. The Uniform Declaratory Judgment Act, as approved by the National Conference of Commissioners on Uniform State Laws in 1922 and as adopted in North Carolina in 1931, provides that "courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." G.S. 1-253.

There is much misunderstanding as to the object and scope of this legislation. Despite some notions to the contrary, it does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450; *Allison v. Sharp*, 209 N.C. 477, 184 S.E. 27; *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532; Anderson on Declaratory Judgments, section 13. This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.

The Act recognizes the need of society "for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence

and destruction of the *status quo.*" Borchard on Declaratory Judgments (2nd Ed.), 4. It satisfies this social want by conferring on courts of record authority to enter judgments declaring and establishing the respective rights and obligations of adversary parties in cases of actual controversies without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party's rights or by repudiating what may be subsequently adjudged to be his own obligations. *Tryon v. Power Co., supra; Green v. Casualty Co.,* 203 N.C. 767, 167 S.E. 38; 16 Am. Jur., Declaratory Judgments, section 7; 1 C.J.S., Actions, section 18; Anderson on Declaratory Judgments, section 71.

While the Uniform Declaratory Judgment Act thus enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. *Etheridge v. Leary,* 227 N.C. 636, 43 S.E. 2d 847; *Tryon v. Power Co., supra; Wright v. McGee,* 206 N.C. 52, 173 S.E. 31; *Light Co. v. Iseley,* 203 N.C. 811, 167 S.E. 56; *In re Eubanks,* 202 N.C. 357, 162 S.E. 769; 16 Am. Jur., Declaratory Judgments, section 9; 1 C.J.S., Actions, section 18; Anderson on Declaratory Judgments, section 22; Borchard on Declaratory Judgments (2d Ed.), 40-48. It necessarily follows that when a litigant seeks relief under the declaratory judgment statute, he must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties to the action with regard to their respective rights and duties in the premises. *Tryon v. Power Co., supra; Light Co. v. Iseley, supra;* 16 Am. Jur., Declaratory Judgments, section 64; 1 C.J.S., Actions, section 18; Anderson on Declaratory Judgments, section 80. If he fails to do this, the other party cannot confer jurisdiction on the court to enter a declaratory judgment by failing to demur to the insufficient pleading. *Wright v. McGee, supra.*

Candor compels the observation that the pleadings in the case at bar do not show the existence of a controversy between the parties as to the meaning of the will or as to their rights thereunder with the explicitness of allegation desirable in declaratory judgment actions. But when these pleadings are interpreted with extreme liberality, they do reveal by implication rather than by express averment that the plaintiffs and the defendants are in dispute as to whether the duties of Lawrence K. Mears as surviving trustee of the testamentary trust have ceased and as to the

respective interests given to them by the will and codicil in the store property and the hotel property of the testator in Canton. In consequence, the court below was empowered to render a declaratory judgment covering these matters.

By virtue of the specific direction of its creator as set forth in the eleventh item of the will and the third item of the codicil, the testamentary trust continued for twenty years after the death of the testator, and terminated upon the expiration of that period. At that time the *corpus* of the trust passed to the beneficiaries entitled to it under the will, and the offices and duties of the trustees ended. 54 Am. Jur., Trusts, section 73; 65 C.J., Trusts, section 15. It appears, therefore, that the trial court properly adjudged that "all duties of Lawrence K. Mears as trustee ceased upon the termination of the trust estate on December 8, 1939."

The judgment declared that Lawrence K. Mears, Zennie Lide, Lucile Wells Marr, and Walter Marlette own the store property in the manner hereinafter set out, and that the remainder of the plaintiffs and the defendants have no interest therein. The defendants excepted to this adjudication.

It is elementary that a will must be construed as it is written. *Hornaday v. Hornaday,* 229 N.C. 164, 47 S.E. 2d 857. The controlling testamentary provisions on this aspect of the case are the third item of the will and the first item of the codicil. When the words of the testator are accorded their plain meaning, it is evident that the codicil effects drastic changes in the provisions of the will relating to the store property. The third item of the will is concerned with the income arising from this property whereas the first item of the codicil deals with the property itself. This codicillary provision makes specific disposition of the store property in fee and in that way precludes its division among "the heirs" of the testator's children under the eleventh item of the original will.

The trial court adjudged that Lawrence K. Mears took a fee simple title to an undivided one-half interest in the store property under the portion of the first item of the codicil providing that "the said Lawrence K. Mears shall have the said one-half interest for and during his natural life, and at his death in fee to his bodily heirs." This ruling is sound for the rule in *Shelley's case* applies to this devise. *Williams v. R. R.,* 200 N.C. 771, 158 S.E. 473; *Helms v. Collins,* 200 N.C. 89, 156 S.E. 152; *Bradley v. Church,* 195 N.C. 662, 143 S.E. 211; *Hartman v. Flynn,* 189 N.C. 452, 127 S.E. 517; *Bank v. Dortch,* 186 N.C. 510, 120 S.E. 60; *Jarman v. Day,* 179 N.C. 318, 102 S.E. 402.

The trial court further declared that Zennie Lide holds a life estate in the other undivided half interest in the store property, and that the remainder in such other undivided half interest therein is vested in Lucile

Wells Marr and Walter Marlette in equal shares and in fee simple absolute. This conclusion is valid.

The first item of the codicil conferred upon Lucile Wells Marr and Cornelia Wells Marlette, respectively, a remainder in fee in one undivided half of the store property, defeasible as to each upon her dying without issue living at the time of her death, and in case either died without issue living at the time of her death, her share was to be owned in fee by the survivor. G.S. 41-4; *Henderson v. Power Co.,* 200 N.C. 443, 157 S.E. 425, 80 A.L.R. 497; *James v. Griffin,* 192 N.C. 285, 134 S.E. 849; *Ziegler v. Love,* 185 N.C. 40, 115 S.E. 887. The estate of Cornelia Wells Marlette in the remainder was converted from a defeasible fee into a fee simple absolute on her death leaving a living son, and her son thereupon acquired her share in the remainder entirely freed from the contingent limitation over. *Vinson v. Gardner,* 185 N.C. 193, 116 S.E. 412. Moreover, the death of Cornelia Wells Marlette made the estate of Lucile Wells Marr in the remainder absolute under the rule that "where an estate has been devised in fee, subject to be defeated by the happening of some future event or contingency, if the happening of such event or contingency becomes impossible of occurrence, the defeasible fee becomes a fee simple absolute." 69 C.J., Wills, section 1559. The gift over of the share in the remainder devised to Lucile Wells Marr was to take effect upon the happening of two events: (1) The death of Lucile Wells Marr without issue living at her death; and (2) the survivorship at her death of her sister, Cornelia Wells Marlette. The prior death of the latter made the happening of the second of these events impossible, thereby destroying the gift over with the result that the fee of Lucile Wells Marr in her share in the remainder became absolute and indefeasible. *Gorham v. Betts,* 86 Ky. 164, 5 S.W. 465; *Anderson v. Brown,* 84 Md. 261, 35 A. 937; *Armstrong v. Thomas,* 112 Miss. 272, 72 So. 1006; *Groves v. Cox,* 40 N. J. Law 40; *Gordon v. Gordon,* 32 S.C. 563, 11 S.E. 334; *Lowry v. O'Brian,* 25 S. C. Eq. 262, 57 Am. Dec. 727; *Smith v. Smith,* 112 Va. 617, 72 S.E. 119; 57 Am. Jur., Wills, section 1247.

This brings us to the adjudication of the court as to the respective rights of the parties in the hotel property. The judgment declared "that Mrs. Zennie Lide is entitled to the free occupancy of the hotel building and the lot on which it is situated for the term of her natural life, either personally or through tenants, or so long as she shall pay the taxes and upkeep and repair of said building and keep the same insured against loss by fire" and that the "heirs" of the testator's children and their representatives, who are properly identified by the court, own the remainder in the hotel property in certain specified proportions. The defendants excepted to this ruling in so far as it adjudged that Mrs. Zennie Lide has any present interest in the hotel property.

The testator placed his real estate, including the hotel property, in trust for the twenty years next succeeding his death. By the eleventh item of his will as modified by the third item of his codicil, he directed that at the expiration of that period his trust estate should be equally divided between "the heirs" of his children, who should take *per stirpes, i.e.,* by right of representation through their respective parents and not as individuals. *Haywood v. Rigsbee,* 207 N.C. 684, 178 S.E. 102; *Lee v. Baird,* 132 N.C. 755, 44 S.E. 605; *Ward v. Stow,* 17 N.C. 509, 27 Am. D. 238; 69 C.J., Wills, section 1312. No other testamentary provision renders the eleventh item of the will inapplicable to the hotel property. The seventh item of the will and the fourth item of the codicil do not do so. In truth, they merely conferred upon Zennie Lide a conditional right to occupy this property pending its sale by the trustees or the termination of the trust. Hence, the right of occupancy of Mrs. Lide under the will and codicil did not survive 8 December, 1939, and the court erred in adjudging that she has any present interest in the hotel property. This error was evidently occasioned by a too literal reliance upon certain language in the opinion in *Lide v. Wells, supra,* where the Court was merely considering the respective rights of the trustees and Mrs. Lide in the hotel property during the existence of the trust.

G.S. 41-6 provides that "a limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will." By virtue of this statute, the word "heirs," as used in the eleventh item of the will, must be construed to mean the "children" of the son and daughter of the testator. *Moseley v. Knott,* 212 N.C. 651, 194 S.E. 100; *Massengill v. Abell,* 192 N.C. 240, 134 S.E. 641; *Lide v. Wells, supra.* All of the children of Lawrence K. Mears and Zennie Lide were living when the testator died. Consequently, they took estates in the hotel property which vested in right at that time with only the possession or enjoyment postponed until the expiration of the twenty years. *Bell v. Gillam,* 200 N.C. 411, 157 S.E. 60; *Lide v. Wells, supra; Cooley v. Lee,* 170 N.C. 18, 86 S.E. 720; *Jones v. Oliver,* 38 N.C. 369. Alton Horace Mears died subsequent to the termination of the trust, and his estate in the hotel property thereupon descended to his children, subject to the right of his widow to dower therein. The record does not disclose the date of the death of Cornelia Wells Marlette. Since her interest vested in right at the death of the testator, it passed by inheritance to her son, regardless of whether she died before or after the expiration of the twenty year period specified in the will. *Knight v. Knight,* 56 N.C. 168; *Mason v. White,* 53 N.C. 421; *Knight v. Wall,* 19 N.C. 125. It appears, therefore, that the following parties own the hotel property as tenants in common in the following proportions: (1) Lucile Wells Marr and Walter Mar-

lette, one-fourth each; (2) Thelma Mears Henderson, Mark Mears, Geraldine Mears Fields, Mamie Ruth Mears Halley, and Linton Norman Mears, one-twelfth each; and (3) Bernard Lawrence Mears, Lynn Laree Mears, and Mary Victoria Mears, one-thirty-sixth each. The shares of the last three are subject to the dower right of their mother, Florence Sadler.

The court rightly refrained from making any specific declaration as to the salableness of the title to the property in suit. This is true because declaratory judgment acts do not empower courts to give advisory opinions as to the marketability of land merely to enable owners to allay the fears of prospective purchasers. Anderson on Declaratory Judgments, section 8.

The court did not stop, however, with mere declarations as to the meaning of the will and codicil, and as to the rights of the parties thereunder in the store property and the hotel property. It incorporated in the judgment provisions ordering the sale of the store property and of the specifically described portion of the hotel property for named amounts, and appointing a commissioner to make such sales and to execute conveyances to the purchasers, and providing for the division of the proceeds arising from such sales among the parties to the action according to their respective rights in the land to be sold as declared by the judgment.

These provisions are not declaratory in nature, and the plaintiffs, who are *sui juris,* have not appealed. For these reasons, we are not concerned on this appeal with the validity of these provisions of the judgment in so far as they relate to the sale of the store property and the interests of the various plaintiffs in the hotel property. But an appropriate exception interposed by the defendants requires us to pass upon their effectiveness in so far as they purport to authorize or direct a sale of the interests of the infant defendants in the hotel property or any part thereof.

There is some diversity of opinion in the various jurisdictions as to how far courts may properly go in awarding affirmative relief in declaratory judgment actions. The present record presents no occasion for expressing an opinion on this question. It is plain that the declaratory judgment acts do not abrogate the ordinary rules of pleading and evidence. Even the most liberal courts will not grant affirmative relief in a declaratory judgment action in the absence of pleading and proof warranting such relief. 16 Am. Jur., Declaratory Judgments, section 73.

Since there is no suggestion by pleading or evidence that the proposed sale of the interests of the infant defendants in the hotel property will benefit them, the order for the sale of such interests is without warrant in the record and must be stricken from the judgment, even if it be conceded that the court may exercise in a declaratory judgment action its inherent power as a court of equity to authorize sales of the real estate

of infants in proper instances. *Marsh v. Dellinger,* 127 N.C. 360, 37 S.E. 494; *Rowland v. Thompson,* 73 N.C. 504; *Williams v. Harrington,* 33 N.C. 616, 53 Am. Dec. 421.

The judgment in the trial court is modified to conform to this opinion. As thus modified, it is affirmed.

Modified and affirmed.

MARY VAIL CAMERON v. BRUCE B. CAMERON.

(Filed 23 November, 1949.)

1. Judgments § 19: Divorce and Alimony § 12—

An order relating to alimony *pendente lite* and the custody of the children of the marriage, which is void because rendered out of term and outside the county, cannot be validated by a subsequent similar order signed in the county but without notice.

2. Divorce and Alimony § 17: Appeal and Error § 14—

Where, pending the hearing of an action for divorce, an order awarding the custody of the children is entered and an appeal taken therefrom, the judge of the Superior Court is *functus officio* and he has no authority to modify the order prior to the hearing of the cause on its merits.

3. Evidence § 7e—

Prima facie proof is any substantial evidence which, if not rebutted, is sufficient to support the cause of action or defense.

4. Divorce and Alimony § 12—

In order to award alimony *pendente lite,* the court is required to examine the evidence adduced by both parties and find the predicative facts in the exercise of his own sound judgment, and where defendant has offered evidence in rebuttal, a finding that the plaintiff had established such facts *prima facie* is insufficient to sustain the award. G.S. 50-15.

5. Divorce and Alimony § 19—

An order awarding the custody of the children pending the hearing of the divorce action on its merits, upon findings that plaintiff had established her cause of action for divorce *prima facie,* and without findings as to the fitness of plaintiff to have the custody of the children, will be remanded.

DEFENDANT'S appeal from *Frizzelle, J.,* Spring Term, 1949, SAMPSON Superior Court.

The plaintiff, then living in the County of Guilford, sued her husband, a resident of New Hanover County, in an action for divorce *a mensa et thoro;* and asked for the rescission of a prior deed of separation which

she alleges was obtained by the defendant through fraudulent or inequitable practices. The action was transferred to Sampson County for trial, "for the convenience of witnesses and to promote the ends of justice," and defendant answered in that county.

The complaint alleges numerous acts of defendant inflicting on the plaintiff personal indignities, assaults, humiliation, neglect, all of which she alleges was without fault on her part. She alleges that they were of such nature as to render her condition intolerable and her life burdensome, and that she was finally forced to seek refuge elsewhere. She, therefore, alleges abandonment as one of the grounds of divorce.

In her complaint the plaintiff asked for alimony pendente lite, suit money, attorneys' fees, expense incurred; and asked the custody of two small children of the marriage.

The appeal is concerned with these demands, pursued through motions and hearings before the judge holding the courts of the district.

The defendant's answer denies the material allegations of the complaint and pleads by way of recrimination the conduct of plaintiff as provocative and independently violative of marital duties and rights; and by way of further defense asserts a cross-action against the plaintiff for absolute divorce on the ground of adultery. On application of the plaintiff for a bill of particulars the defendant specified a number of incidents, alleging time, place and corespondents, with an averment of other acts with persons unknown to him.

Pursuing the prayer in her complaint, the plaintiff gave notice of her intended application for alimony, attorneys' fees and expenses, and custody of the children, *pendente lite*. The matter came on for a hearing before Judge Frizzelle, holding the courts of the District, on June 2, 1949, at which time the judge heard the plaintiff's pleadings, the evidence and arguments of counsel, and took the matter under advisement, parties consenting that the judgment should be signed outside the county. Judgment was finally signed in Onslow County. Pertinent to the decision are the following excerpts:

> "The action is brought by the plaintiff under G.S. 50-15 for divorce from bed and board, for alimony, and for the custody of the two minor children of the parties, who have been and are now in the custody of the defendant father. The plaintiff in her complaint bases her cause of action on two grounds: first, that the defendant offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome; and second, that the defendant wrongfully abandoned her. The plaintiff, in much detail and elaboration, alleges a long continued scheme and course of insults, humiliation, neglect and barbarous treatment and alleges a good

and meritorious cause of action on both grounds. In his answer, the defendant denies all material allegations in the complaint, and alleges acts of provocation, indiscretion, and gross misconduct on the part of the plaintiff in bar of her right to the relief sought; and by cross-action seeks a decree of absolute divorce on the ground of adultery."

"That plaintiff and defendant are husband and wife and have two infant daughters of their marriage, ages 4½ and 3 years; *prima facie* the defendant abandoned the plaintiff on or about September 1, 1948, and has not provided any subsistence and support for her since said date; that prior to said alleged and *prima facie* abandonment the plaintiff owned valuable real and personal property which produced in 1947 a separate income in her own right of $15,498.84; that prior to said alleged abandonment the defendant *prima facie* procured from the plaintiff a transfer and conveyance of all said real and personal property, and plaintiff has now no property or separate estate and is wholly without income from any kind of property, and has not sufficient means whereon to subsist during the pendency of this action, nor any income to defray the necessary and proper expenses thereof; that said plaintiff is now ill and in need of hospital treatment and is dependent upon the defendant for her support and maintenance; that the plaintiff has *prima facie* incurred bills for necessities for her support since the date of the alleged abandonment in the sum of $2,033.26, which are unpaid, and has borrowed an additional sum of $1,270.65 for her necessary maintenance prior to the institution of this action in addition to financial aid she has received from her mother."

"That plaintiff's complaint alleges a good and meritorious cause of action; and although the defendant has filed answer denying each and every material allegation in the complaint, and alleging the adultery of the plaintiff as grounds for an absolute divorce, the plaintiff has filed a reply and has denied, under oath, the adultery alleged against her in the answer; and the Court finds that such denial is made in good faith and that upon the record and the evidence the Court cannot and does not find that the plaintiff has committed adultery as alleged by the defendant."

"It appearing satisfactorily to the court and it appearing *prima facie* that the allegations of the complaint are true, it is thereupon CONSIDERED, ORDERED, ADJUDGED AND DECREED, in the discretion of the Court, having due regard to the circumstances of the parties, that the defendant Bruce B. Cameron, Jr. pay the plaintiff Mary Vail Cameron, as alimony *pendente lite*, the sum of $800.00 per month commencing on December 23, 1948, the date of plaintiff's motion therefor, and a like sum of $800.00 per month on the 23rd day of each

and every month thereafter, pending the final determination of this cause, the six monthly payments accrued from December 23, 1948, to May 23, 1949, in the aggregate sum of $4,800.00 to be paid within ten days from this date, and the subsequent payments of $800.00 per month to be paid on the 23rd day of each month hereafter commencing on June 23, 1949, pending the final determination of this cause."

Regarding the custody of the children in general, the order allowed them to remain with the defendant, with permission of visiting by the mother at stated intervals under prescribed conditions. To this order defendant excepted and appealed.

Thereafter, while the appeal was still pending, defendant was notified of a further motion for hearing at Kinston, in Lenoir County, on June 24, 1949, respecting the custody of the children. At the time and place set for the hearing, attorneys for the defendant entered a special appearance and moved to quash, or dismiss the motion. This was overruled and judgment was entered; and an order was made substantially enlarging the time plaintiff should have custody of the children; to this defendant excepted and appealed. Subsequently, without further notice, Judge Frizzelle entered an order of June 30 in continuation of the proceeding set for a hearing and heard in the County of Lenoir in which the former order made outside the County of Sampson was affirmed or a similar order made, the court taking this course for the expressed reason "that the defendant proposed to challenge the jurisdiction of the court to enter such order in Kinston outside of the County of Sampson where the cause is pending." This order was signed in Sampson County Courthouse out of term and without further notice.

The defendant then applied to the Honorable Walter P. Stacy, Chief Justice of the Supreme Court, for a writ of *supersedeas*. After a hearing in which counsel on both sides argued the matter and submitted briefs, the *supersedeas* was issued, commanding those concerned to desist from enforcement of the orders aforesaid until determination of the matter on appeal.

Meantime, in view of the taking of certain depositions by the defendant in other states, an order had been made that the defendant pay $800 as expense money to enable the plaintiff to be represented at the taking of these depositions. This order the defendant voluntarily performed, and discharged that matter from further consideration.

The stipulation of opposing counsel confined the present controversy to the two orders of Judge Frizzelle dated, respectively, June 2 and June 30.

Having excepted and appealed from the orders as stated, the defendant filed his assignments of error which, as far as necessary to the decision, are herewith considered.

Welch Jordan and Butler & Butler for plaintiff, appellee.

Stevens, Burgwin & Mintz, Howard H. Hubbard, and Jeff D. Johnson, Jr., for defendant, appellant.

SEAWELL, J. *The order of June 30.* From the record we find that subsequent to the rendition of judgment upon the order of June 2, considered *infra,* and while appeal therefrom was still pending, notice was given to the defendant of a hearing at Kinston, in Lenoir County, upon the motion by the plaintiff for the custody of the two children dealt with in the order of June 2. At the time and place set for the hearing defendant's counsel entered a special appearance and moved to quash or dismiss the motion, which was overruled, and defendant excepted and appealed. Judge Frizzelle proceeded with the hearing and by order signed in Kinston, Lenoir County, on the 27th of June, made an order greatly enlarging plaintiff's custody of the children pending the appeal. Having become uncertain as to his jurisdiction under the circumstances, the Judge subsequently withdrew this order and signed an order in the courthouse in Sampson County of precisely similar import, except for the statement therein that it was made in Sampson County. The defendant appealed from this order and, having given the requisite bonds on appeal, applied to Hon. Walter P. Stacy, Chief Justice of the Supreme Court, for *supersedeas* to stay execution, which was granted on the ground that both the orders of June 27 and June 30 were void.

The Court is of the opinion that the validity of these orders, which is still insisted upon here with respect to the order of June 30, resolves itself into the simple question whether the court had jurisdiction either to hear the matter or render judgment outside the county where the case is pending, and this must be answered, No. No validity was given to the order of June 30 in the attempted recapture of jurisdiction by signing it in the courthouse in Sampson County, not merely because the notice was given and the hearing had in Lenoir County, but because no notice of the intended rendition of the judgment in Sampson County had been given. *Patterson v. Patterson,* 230 N.C. 481; *Cahoon v. Brinkley,* 176 N.C. 5, 96 S.E. 650; *Gaster v. Thomas,* 188 N.C. 346, 124 S.E. 609; *Brown v. Mitchell,* 207 N.C. 132, 176 S.E. 258.

There is another reason especially arising out of the status of the case during appeal; under the circumstances of this case the judge was *functus officio,* his authority over the matters involved having ended with the appeal from the order of June 2, which took the case out of his juris-

diction. *Lawrence v. Lawrence,* 226 N.C. 221, 222, 37 S.E. 2d 496; *Page v. Page,* 167 N.C. 346, 83 S.E. 625.

The order of June 27 is eliminated by the stipulation of counsel. The order of June 30, for the reasons stated, is void and must be vacated.

The order of June 2. The appeal under consideration is not from a final judgment but from orders made on preliminary motions in the cause, peculiar to actions of this kind, and a detailed statement of the voluminous evidence presented on the hearing is not necessary at this stage of the proceeding. We are, of course, dealing with the evidence on which the order of June 2 was made, but only as far as may be necessary to determine whether the court below applied to it the consideration required by the relevant statute in the process of finding facts necessary to support the order, or judgment, involved in the appeal. It is sufficient to say that the evidence adduced by each of the parties, respectively, posed inferences of fact on either side of the controversy, addressed to the determinative questions, upon the resolution of which the order or awards must rest. Of what comparative strength these inferences may be is not for us to say; the thing of importance here is whether they were given due regard by the hearing judge.

His Honor's conception of the duty resting upon him in passing on the evidence and finding these essential facts is revealed in the general summary statement made just before proceeding to the awards: "It appearing satisfactorily to the Court and it appearing *prima facie* that the allegations of the complaint are true . . ." etc. This, taken in connection with the repeated use of the technical and well understood term *prima facie* in more specific relation to individual findings of fact necessary to support the judgment leads inescapably to the conclusion that the hearing judge deemed it to be his duty to go into the matter and examine the evidence only as far as might be necessary to find whether plaintiff had made a *prima facie* case, and made his orders accordingly, without addressing himself to the truth or falsity, or, to put it otherwise, the probative force, of the evidence before him, or even necessarily including that of the defendant.

The Judge, of course, knew the legal significance of the term and the necessity of applying it aptly. *Prima facie* has been defined as "a cause of action or defense sufficiently established by a party's evidence to justify a verdict in his favor, provided the other party does not rebut such evidence," in Ballentine's Law Dictionary, p. 1009. The term *prima facie* is said to mean "as it first appears; at first sight; at first view; on its face; on the face of it; on first appearance; presumably; so far as can be judged by the first disclosure," 49 C.J. 1346. In our jurisdiction any substantial evidence, unrebutted, is sufficient, *prima facie,* to support the allegation.

This is as far as the judge was required to go under the common law, or the relevant statute prior to the amendment of 1883, discussed below. *Sparks v. Sparks,* 69 N.C. 319; *Earp v. Earp,* 54 N.C. 118; *Everton v. Everton,* 50 N.C. 202; *Gaylord v. Gaylord,* 57 N.C. 74. The significance of the relevant statute, G.S. 50-15, as it now stands is made clear by comparing the former law with amendments made to it.

The former statute, Sec. 38 of Chapter 193, of the Laws of 1871-72, provided: "If any married woman shall apply to the court for a divorce from the bonds of matrimony or from bed and board, with her husband, and shall set forth in her complaint *such facts as if true will entitle her to the relief demanded . . .*" etc. Chapter 67, Public Laws of 1883, struck out of that statute the words "as if true will entitle her to the relief demanded," and inserted in lieu thereof the words, "which upon application for alimony *shall be found by the judge to be true* and to entitle her to the relief demanded in the complaint;" and amended the same section of the 1871-72 law by adding to the provision of notice the following: "In all cases of application for alimony *pendente lite* under this or the following section, whether in or out of term, *it shall be proper and admissible for the husband to be heard by affidavit in reply . . .*" etc. This definitely disposed of the *prima facie* rule theretofore obtaining and constitutes the law as it stands today.

Space will not permit us to trace the history of this statute,—of nearly 100 years standing,—to note the various amendments and collate the decisions in correlated order. It is sufficient to say that under a proper interpretation of this statute it is no longer sufficient that the judge merely examine the evidence or testimony to see whether there is *any evidence* to support the charges or allegations which would operate as a *prima facie* showing. He must, by application of his sound judgment, pass upon its truth or falsity and find according to his conviction. The effect of the statute is to retire the *prima facie* rule in actions brought by the wife against the husband where alimony *pendente lite* is sought and to substitute for it a finding of verity. The statute requires not only notice and hearing, but a finding as to the truth of the essential conditions on which the allowance is predicated.

Whether the purpose of the statute is to screen the courts against pretextual grievances or to protect the respondent from sequestration of his property or jeopardy of his liberty upon false premises, we need not inquire. Perhaps its purpose simply was to give respondent a measure of justice by permitting him to be heard before a matter-of-course invasion of his estate should be made. At any rate the kind of hearing this statute provides, has, by its enactment, become a policy of the State and must be obeyed by its substantial observance. *Massey v. Massey,* 208 N.C. 818, 182 S.E. 446; *Caudle v. Caudle,* 206 N.C. 484, 174 S.E. 304;

Horton v. Horton, 186 N.C. 332, 119 S.E. 490; *Garsed v. Garsed,* 170 N.C. 672, 87 S.E. 45; *Moore v. Moore,* 130 N.C. 333, 41 S.E. 943.

In *Medlin v. Medlin,* 175 N.C. 529, 531, 95 S.E. 881, (cited by appellee), in which alimony and defense money was asked by the wife sued for divorce on grounds of her adultery, the contention was made that no award could be made to the wife in a case of that sort because it was not covered by the statute; and the Court held that in case the statute did not apply, alimony could still be awarded under the common law; and that the statute did not abrogate the remedy given at common law. The case dealt solely with the remedy, and not with the rule relating to the consideration of the evidence through which it is sought, or the *prima facie* rule formerly applied.

We can logically follow *Medlin v. Medlin* in its holding that the statute does not abrogate the principle on which alimony was allowed at the common law. But the statute is not a mere affirmance of the common law—this would be supererogatory. The procedure instituted by the statute is so opposed to the *prima facie* rule of the common law as to substantially modify it, and does not leave the effect of the 1883 amendment open to question.

However, the following occurs in *Medlin v. Medlin,* loc. cit., p. 532: "In *Webber v. Webber, supra,* very clear intimation is given that the statute itself, by correct interpretation, should be extended to cover all cases where the wife was a *party* to a divorce proceedings, whether as plaintiff or defendant . . ." *Webber v. Webber* clearly states that the statute (then unamended), should be so construed; and if so construed, the amendments of 1883 should fully apply, and result, as foreshadowed, in harmonizing the law.

But this has little bearing on the proposition we are discussing. As we have intimated above, alimony was not asked except in connection with the suit of the wife; and the record shows that the challenged order was predicated both ostensibly and actually on the *prima facie* findings relating to the wife's action. If the suit of the husband entered into the consideration at all, the suit of the wife was at least the major consideration and cannot be dissected out of the findings. This inseparability alone would affect the whole proceeding with error.

It is pointed out by the appellant that the judge made no findings of fitness as to the plaintiff for the custody of the children under the challenging evidence of the defendant. Apart from that we think the question of custody is so intimately connected with the other matters involved in the appeal that it should be left to a rehearing.

In view of the errors we have pointed out, we have been unable to sustain the orders and awards made in the judgments of June 30, 1949, and June 2, 1949; and these orders are vacated, except as to the order

allowing $800 expense money for representation and appearance at the taking of depositions outside the State, which, as we have said, was voluntarily performed by the defendant and must be regarded as an accomplished fact.

The cause will be remanded to Sampson County to the end that a hearing *de novo* may be had with respect to the matters involved in the vacated orders.

Error and remanded.

IN THE MATTER OF ATKINSON-CLARK CANAL COMPANY, SPECIAL PROCEEDING NO. 471.

(Filed 23 November, 1949.)

1. Drainage Districts and Corporations § 10—

When the validity of a drainage assessment is challenged the burden is upon the drainage district or corporation to show that it was created in substantial compliance with the applicable statutes and that the assessments were levied pursuant to and in compliance with the statutory provisions. G.S. 156-37 through G.S. 156-43.

2. Drainage Districts and Corporations § 1—

In order to establish a drainage corporation it is necessary that a petition in conformity with G.S. 156-37 be filed and that commissioners be appointed and that they file a report in conformity with G.S. 156-38, and that there be an adjudication and confirmation of the report, G.S. 156-41. It is only after such confirmation that the corporation may be declared to exist and may proceed to organize and levy assessments, G.S. 156-42.

3. Same—

Where petitioners show only the granting of an easement in response to a petition by an individual to be allowed to drain into an existing canal on the lands of another under the provisions of G.S. 156-2, G.S. 156-3 and G.S. 156-10, such evidence is insufficient to show the establishment of a drainage corporation under the provisions of G.S. 156-37, *et seq.*

4. Drainage Districts and Corporations § 10—

The fact that most of the proprietors have paid the drainage assessments levied against their lands does not preclude another proprietor from attacking the validity of the assessments levied against her.

APPEAL by exceptor Estelle Harris Bunting, from *Frizzelle, J.*, at Chambers in Greenville, N. C., 10 February, 1949. From PITT.

The facts pertinent to this appeal are as follows:

1. On 22 September, 1948, a paper writing, purporting to be a certificate of assessment of the Board of Directors of Atkinson-Clark Canal

Company, was presented to the Clerk of the Superior Court of Pitt County, to be passed upon and approved by him, in accordance with the provisions of G.S. 156-42. The Clerk signed an order refusing to approve the certificate which showed a number of unpaid assessments, among them being three aggregating $1,628.00 against Estelle Harris Bunting. The petitioner appealed from the order of the Clerk to the Judge of the Superior Court.

2. The appellant moved, on 28 October, 1948, to be made a party and for permission to be heard in the matter, which motion was granted.

3. The cause came on for hearing before his Honor at Chambers in Greenville, N. C., upon the record and various documents offered by petitioner's counsel, as follows:

(a) The purported certificate of assessment.

(b) Certain paper writings, purporting to be copies of minutes of stockholders' and directors' meetings of the Atkinson-Clark Canal Company, purporting to authorize certain improvements to parts of the canal and to levy three separate assessments to defray the cost thereof, none of which was signed. Exception. Later the purported original minutes were delivered to his Honor, but no evidence was offered as to their authenticity.

(c) A petition signed by ten landowners reading as follows: "We the undersigned owners of land included in the boundaries of the Atkinson-Clark Canal Company do hereby petition the Directors of the company to have the existing canals cleaned and reworked to provide a sufficient drainage for our lands. We further request that the Directors levy an assessment on the land in the boundaries of Atkinson-Clark Canal Company for the purpose of paying the cost of such improvements."

(d) The original papers of record in the office of the Clerk of the Superior Court of Pitt County, being known as "Special Proceeding No. 471."

4. It was admitted in open court that if the Atkinson-Clark Canal Company is a corporation, it was "organized and derived its vitality and existence from Special Proceeding No. 471 in the office of the Clerk of the Superior Court of Pitt County," which proceeding is copied in full in the record.

5. The appellant requested the court to find as a fact that the petitioner had offered no evidence before the Clerk of the Superior Court or before his Honor, tending to show that the proposed certificate of assessment was "in conformity with and in compliance with the report of the Commissioners," as required by G.S. 156-42; that the proposed certificate of assessment is not in compliance with the provisions of G.S. 156-42; and moved that the order of the Clerk of the Superior Court be affirmed and the appeal dismissed; and tendered judgment accordingly. The

court declined to find the requested facts; denied the motion and also declined to sign the tendered judgment. To all of which the appellant excepted.

6. By consent of the parties it was stipulated and agreed that his Honor might render judgment out of term and out of the county.

Whereupon the court found as a fact that the Directors of the Atkinson-Clark Canal Company have made three assessments upon the lands which compose the said company, the assessments having been made in the years 1947 and 1948; that the assessments were made for a purpose provided for in Section 156-42 of the General Statutes of North Carolina, to wit, for the maintenance and upkeep of the canal of the corporation; that the assessments were properly made by the Directors of said Canal Company; that the proposed certificate of assessment should be filed for record amongst the papers on file in the office of the Clerk of the Superior Court of Pitt County relating to the organization of the Canal Company and known as Special Proceeding No. 471; and that the amounts of money due by the proprietors of the land, who are listed in said certificate, should be entered as judgments *in rem* against such proprietors, in the amounts shown in the certificate.

Judgment was entered accordingly. To the facts found by the court and to the signing of the judgment, the appellant excepted and appeals, assigning error.

H. S. Ward and F. M. Wooten, Jr., for appellee.

Sam B. Underwood, Jr., for appellant.

DENNY, J. The appellant challenges the validity of the assessments which the petitioner undertook to levy. She excepted to the finding of fact that the assessments were properly made by the Directors of the Canal Company, on the ground that the petitioner offered no evidence to show that the assessments were made in compliance with the report of Commissioners on which the corporation is based, as required by G.S. 156-42.

The burden was upon the petitioner to show that it was created and organized pursuant to the provisions of what is now Subchapter II, G.S. 156-37 through 156-43, and that the assessments made were levied pursuant to and in compliance with the provisions of such subchapter. Whenever any drainage corporation, drainage district or municipality seeks to levy a special assessment on lands within the boundaries of such district or municipality, and the validity of the assessment is challenged, it has the burden of showing a substantial compliance with such statutory provisions as are essential to the validity of the assessment. *In re*

Westover Canal, 230 N.C. 91, 52 S.E. 2d 225; *Holton v. Mocksville,* 189 N.C. 144, 126 S.E. 326.

In order to create a drainage corporation, such as the petitioner purports to be, before such corporation can be created, it is necessary for a petition to be filed in the Superior Court by a proprietor in fee of swamp lands, which cannot be drained except by cutting a canal through the lands of another or other proprietors in fee, situated at a lower level and which would also be materially benefited by the cutting of such canal. G.S. 156-37. It is then provided in G.S. 156-38:

"On the establishment by the petitioner of his allegations, the court shall appoint three persons as commissioners who, having been duly sworn, shall examine the premises and inquire and report—

"1. Whether the lands of the petitioner can be conveniently drained otherwise than through those of some other person.

"2. Through the lands of what other persons a canal to drain the lands of the petitioner should properly pass, considering the interests of all concerned.

"3. A description of the several pieces of lands through which the canal would pass, and the present values of such portions of the pieces of lands as would be benefited by it, and the reasons for arriving at the conclusion as to the benefit.

"4. The route and plan of the canal, including its breadth, depth, and slope, as nearly as they can be calculated, with all other particulars necessary for calculating its cost.

"5. The probable cost of the canal and of a road on its bank, and of such other work, if any, as may be necessary for its profitable use.

"6. The proportion of the benefit (after a deduction of all damages) which each proprietor would receive by the proposed canal and a road on its bank if deemed necessary, and in which each ought, in equity and justice, to pay toward their construction and permanent support.

"7. With their report they shall return a map explaining, as accurately as may be, the various matters required to be stated in their report."

When such commissioners file their report, "If it appear that the lands on the lower level will be increased in value twenty-five per cent or upwards by the proposed improvement, within one year after the completion thereof, and that the cost of making such improvement will not exceed three-fourths of the present estimated value of the land to be benefited, and that the proprietors of at least one-half in value of the land to be affected consent to the improvement, the court may confirm such report, either in full or with such modifications therein as shall be just and equitable." G.S. 156-40.

And it is only after a final adjudication and confirmation of the report of the Commissioners, that the proprietors of the several pieces of land

adjudged to be benefited by the improvement shall be declared a corporation, G.S. 156-41, and may proceed to organize and levy assessments in conformity with the provisions of G.S. 156-42.

The petitioner admits that it is not a corporation unless these essential statutory requirements were complied with in the Special Proceeding, known as No. 471, which was instituted in Pitt County, 18 January, 1886.

Therefore, it is necessary to determine whether or not that Special Proceeding shows a substantial compliance with the above statutes, and that the petitioner was created as a drainage corporation, pursuant to the petition, answer, Commissioners' report and order of confirmation entered therein.

It is disclosed by Special Proceeding No. 471, that J. J. Hathaway and wife, Rebecca Hathaway, filed a petition in the office of the Clerk of the Superior Court of Pitt County, in conformity with the provisions of Code 1297, Rev. 3983, now G.S. 156-2, to obtain permission to construct a canal from their swamp land, as authorized by Code 1305, Rev. 3990, now G.S. 156-10, across the lands of the defendants to a ditch or canal constructed by the defendants, and which drained their lands and emptied into Tar River. Each of the defendants was summoned to appear before the Clerk of the Superior Court of Pitt County. A hearing was held and Commissioners appointed, as authorized by Code 1297, Rev. 3983, now G.S. 156-2. The Commissioners went on the premises, as required by Code 1298, Rev. 3984, now G.S. 156-3, and reported that the petitioners were entitled to the relief sought; designated where the canal was to be cut, prescribed its width and depth; reported that the utility or safety of the defendants' canal or ditch would not be impaired or endangered by the petitioners draining their land in the manner set forth, nor would the defendants be damaged thereby. The only assessment authorized by the report was in the following language: "That whenever the defendants, or those who are owners of the canal upon the defendants' lands, shall clean out their entire canal the petitioners shall pay to them the sum of Fifteen dollars which we assess to be their proportionate part of said work."

The cause then came on for hearing before the Clerk of the Superior Court, upon the report of the Commissioners. The report was confirmed, and an order entered granting the petitioners an easement over the lands of the defendants and authorizing them to construct the canal "in the manner determined on and reported by the Commissioners," as provided in Code 1299, Rev. 3985, now G.S. 156-4.

There is nothing in this Special Proceeding from which it can be inferred that the parties either proceeded under the statutes relied on by

the petitioner or from which it might reasonably be inferred that a drainage corporation was created or intended to be created.

It would seem the petitioner and the petitioning proprietors assumed the corporate existence of the Canal Company when the improvements were undertaken in 1947. Such a corporation might have been organized and the assessments duly levied if the proprietors of the existing canal had proceeded in conformity with the provisions of G.S. 156-43.

It is argued that the judgment below should not be disturbed, since most of the assessments levied in 1947 and 1948 have been paid. However, that fact does not foreclose the right of the appellant to challenge the validity of the assessments. And we do not think it amiss to point out that counsel for the appellant, stated in the course of his argument before this Court, that the appellant is not resisting the payment of her rightful share of the cost of the improvements heretofore made, but is only insisting upon the determination of her proper share of the cost of these improvements in the manner provided by law.

In view of what we have said, and in the light of the statutes cited, it is our opinion that the petitioner has not only failed to show its existence as a drainage corporation, but has also failed to show substantial compliance with the statutes which authorize such assessments if it were a corporation. Therefore, the Court below should have found the facts as requested by the appellant and allowed her motion to affirm the order of the Clerk of the Superior Court and to dismiss the appeal.

This cause is remanded for judgment in accord with this opinion.

Error and remanded.

STATE v. FLOYD BAKER.

(Filed 23 November, 1949.)

1. Trespass § 9—

The three types of criminal trespass are (1) those designed to punish offenses against the freehold rather than the possession, (2) those designed to protect actual possession only, and (3) those designed to protect possession regardless whether it be actual or constructive. Actual possession consists in exercising acts of dominion over the land; constructive possession is theoretical possession arising from the existence of title which gives the right to assume immediate actual possession.

2. Same—

G.S. 14-134 is designed to protect possession regardless whether it be actual or constructive.

3. Same—

In a prosecution under G.S. 14-134 the State must show (1) that the land was in the actual or constructive possession of prosecutor, (2) that defendant entered upon the land intentionally, and (3) that accused did so after being forbidden by the prosecutor.

4. Same—

In a prosecution under G.S. 14-134, even though the State establish that defendant intentionally entered upon land in the actual or constructive possession of prosecutor after being forbidden to do so by the prosecutor, and thus established as an ultimate fact that defendant entered the *locus in quo* without legal right, defendant may still escape conviction by showing as an affirmative defense that he entered under a *bona fide* claim of right, *i.e.*, that he believed he had a right to enter, and that he had reasonable grounds for such belief.

5. Trespass § 10—

Where, in a prosecution under G.S. 14-134 the only evidence offered by the State as to title of prosecutor is oral testimony that prosecutor had purchased the property, and the only evidence of possession was that prosecutor had warned defendant to stay off the land and had entered upon the land temporarily on a single occasion to erect a barbed wire fence thereon, *held*, defendant's motion to nonsuit should have been granted, since the evidence is insufficient to establish prosecutor's possession of the land within the meaning of the statute.

6. Property § 3—

Proof of the destruction of a fence erected upon land is insufficient to sustain a conviction upon an indictment charging wanton and willful injury to personal property, since a fence is a part of the realty and there is a fatal variance between allegation and proof. G.S. 14-160.

7. Criminal Law § 81f—

Decision of the Supreme Court sustaining defendant's exceptions to the refusal of his motions for nonsuit has the force and effect of a verdict of not guilty. G.S. 15-173.

APPEAL by defendant from *Grady, Emergency Judge,* and a jury, at the June Term, 1949, of WAKE.

This appeal involves three criminal actions which originated in the Recorder's Court of Wake Forest, and were carried thence to the Superior Court by appeals of the defendant. The cases were consolidated by consent in the Superior Court, where trial was had *de novo* on the original warrants. The first two warrants were based on criminal complaints drawn under G.S. 14-134, which charged the defendant with trespassing on two separate occasions upon the lands of the New Bethel Church, a religious congregation, after being forbidden to do so by its duly constituted officers. The third warrant was supported by a criminal complaint drawn under G.S. 14-160, which charged the defendant with wantonly

and willfully injuring "personal property belonging to New Bethel Church."

The State presented no documentary evidence to show any title in the New Bethel Church. It did introduce oral testimony, however, indicating that the New Bethel Church laid claim to two tracts of land adjoining a public highway known as the Raleigh Road in Barton Creek Township in Wake County; that the first of these tracts contained a church building and had been in the actual occupation of the congregation for upwards of fifty years; that the second of these tracts, which embraced about two acres, had been purchased from Zelma Rudd in May or June, 1947, and lay between the farm of the defendant and the Raleigh Road; that the officers of the New Bethel Church forbade the defendant to enter upon the two-acre tract, and thereafter, to wit, on 17 August, 1948, and October 1, 1948, the defendant traveled to and fro thereon between his farm and the Raleigh Road; that thereafter, to wit, on 4 January, 1949, officers and members of the New Bethel Church erected a barbed wire fence along an edge of the two acre tract to preclude its use as a way by the defendant, and two hours later the defendant tore down the fence; and that the two-acre tract was not in the actual possession of anybody during the times in controversy, except for two or three hours on 4 January, 1949, while officers and members of the Church were engaged in the erection of the barbed wire fence mentioned above.

The defendant introduced a duly registered deed dated 9 December, 1939, whereby J. K. Ray and his wife, Iola Ray, purported to convey to the defendant in fee simple eighty acres of land adjoining the Raleigh Road and the first tract claimed by the New Bethel Church in Barton Creek Township in Wake County. The defendant presented oral testimony tending to show that the eighty acre tract embraced the *locus in quo;* that he had been in the actual possession of the *locus in quo* and all other portions of the eighty acre tract at all times since 9 December, 1939, under a claim of fee simple ownership based upon his deed; and that he had torn down the barbed wire fence because it had been erected by the prosecutor against his will upon the land occupied and claimed by him under his deed, and interfered with his use of such land.

The jury found the defendant guilty in all three cases, and the court pronounced judgments of imprisonment upon the verdicts. The defendant excepted and appealed, assigning as errors the refusals of the court to nonsuit the actions under G.S. 15-173.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

M. Hugh Thompson and J. J. Sansom, Jr., for defendant, appellant.

ERVIN, J. The criminal complaints underlying the first two warrants charge the defendant with trespass on the land of another after notice or warning contrary to a statute, which was enacted in 1866 and which is now codified as G.S. 14-134. The portion of the statute germane to this appeal is in these words: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days." G.S. 14-134.

Various criminal trespasses to land and fixtures are known to the law. Some are common law crimes, and others are legislative creations. *S. v. Phipps,* 32 N.C. 17; *S. v. Love,* 19 N.C. 267; *S. v. Flowers,* 6 N.C. 225; *S. v. Trexler,* 4 N.C. 188; G.S., Ch. 14, Art. 22. They fall into three classifications when tested by their social objectives.

Some, *e.g.,* the crime of unlawfully cutting, injuring or removing another's timber as defined by G.S. 14-135, are offenses against the freehold rather than the possession, and in them ownership of the property by the prosecutor is a *sine qua non* to conviction. *S. v. Boyce,* 109 N.C. 739, 14 S.E. 98.

Others, *e.g.,* the misdemeanor of forcible trespass under G.S. 14-126, are designed to protect actual possession only, and in them it is no defense that the accused has title to the *locus in quo* if the prosecutor be in actual possession of it. *S. v. Davenport,* 156 N.C. 596, 72 S.E. 7; *S. v. Campbell,* 133 N.C. 640, 45 S.E. 344; *S. v. Fender,* 125 N.C. 649, 34 S.E. 448; *S. v. Webster,* 121 N.C. 586, 28 S.E. 254; *S. v. Howell,* 107 N.C. 835, 12 S.E. 569; *S. v. Marsh,* 91 N.C. 632; *S. v. Laney,* 87 N.C. 536. It is said in cases involving this class of criminal trespasses that "if the defendant has a better title than the prosecutor to the premises or to the possession thereof, he can assert it by due course of law, but he cannot do so by violating the criminal law of the State." *S. v. Hovis,* 76 N.C. 117.

There is yet another category of criminal trespasses to realty. It embraces offenses intended to protect possession, regardless of whether it be actual or constructive in its nature. *S. v. Reynolds,* 95 N.C. 616. Actual possession is a tangible fact, and constructive possession is a legal fiction. Actual possession of land consists in exercising acts of dominion over it, and in making the ordinary use of it to which it is adapted, and in taking the profits of which it is susceptible. *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347. Constructive possession is that theoretical possession which exists in contemplation of law in instances where there is no possession in fact. When land is not in the actual enjoyment or occupation of anybody, the law declares it to be in the constructive possession of the person whose title gives him the right to assume its immediate actual possession. *Ownbey v. Parkway Properties, Inc.,* 222 N.C. 54,

21 S.E. 2d 900; *Mitchell v. Bridgers,* 113 N.C. 63, 18 S.E. 91; *Graham v. Houston,* 15 N.C. 232.

In prosecutions for criminal trespasses of the second class, *i.e.,* those which are offenses against actual possession only, the title is not in issue, but the State must prove actual possession of the premises by the prosecutor as an indispensable element of the charge. It inevitably ensues that the prosecution fails in such cases for defect of proof if the evidence discloses that the accused and not the prosecutor actually occupied the *locus in quo* at the time in controversy.

These observations apply with equal force to prosecutions for criminal trespasses of the third category, *i.e.,* offenses against either actual or constructive possession, unless such prosecutions be founded on entries upon vacant land. In the last mentioned eventuality, the title is in issue for the State cannot prevail, in such case, without showing the constructive possession of the prosecutor as an essential ingredient of the accusation, and to do that, the State must establish title in the prosecutor at the time of the alleged offense. *S. v. Reynolds, supra.* In consequence, the prosecution fails in this instance for defect of proof if the testimony reveals that at such time the accused and not the prosecutor had title to the *locus in quo.*

The crime created by the enactment now codified as G.S. 14-134 falls within the third category of criminal trespasses, *i.e.,* those designed to protect possession without regard to whether it be actual or constructive. *S. v. Yellowday,* 152 N.C. 793, 67 S.E. 480. To constitute trespass on the land of another after notice or warning under this statute, three essential ingredients must coexist: (1) The land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) the accused must do this after being forbidden to do so by the prosecutor. Although the State may prove beyond a reasonable doubt in a prosecution under this statute that the accused intentionally entered upon land in the actual or constructive possession of the prosecutor after being forbidden to do so by the prosecutor and thus establish as an ultimate fact that the accused entered the *locus in quo* without legal right, the accused may still escape conviction by showing as an affirmative defense that he entered under a *bona fide* claim of right. *S. v. Faggart,* 170 N.C. 737, 87 S.E. 31; *S. v. Wells,* 142 N.C. 590, 55 S.E. 210; *S. v. Glenn,* 118 N.C. 1194, 23 S.E. 1004. When an accused seeks to excuse an entry without legal right as one taking place under a *bona fide* claim of right, he must prove two things: (1) That he believed he had a right to enter; and (2) that he had reasonable grounds for such belief. *S. v. Faggart, supra; S. v. Wells, supra; S. v. Durham,* 121 N.C. 546, 28 S.E. 22; *S. v. Calloway,* 119 N.C. 864, 26 S.E. 46; *S. v. Glenn, supra; S. v.*

Fisher, 109 N.C. 817, 13 S.E. 817; *S. v. Crawley,* 103 N.C. 353, 9 S.E. 409; *S. v. Lawson,* 101 N.C. 717, 7 S.E. 905, 9 Am. St. Rep. 42; *S. v. Winslow,* 95 N.C. 649; *S. v. Bryson,* 81 N.C. 595; *S. v. Crossett,* 81 N.C. 579; *S. v. Hause,* 71 N.C. 518; *S. v. Whitehurst,* 70 N.C. 85; *S. v. Ellen,* 68 N.C. 281; *S. v. Hanks,* 66 N.C. 612.

The assignments of error of the defendant based upon the refusal of the trial court to dismiss the prosecutions for trespass upon compulsory nonsuits under G.S. 15-173 present this query: Was the testimony of the State at the trial sufficient to sustain the allegations of the criminal complaints that the *locus in quo* was the land of the prosecutor within the meaning of G.S. 14-134? This question must be answered in the negative for the reason that the State failed to offer evidence indicating that the prosecutor had either actual or constructive possession of the property in controversy.

The testimony of the prosecution itself discloses that the only acts done by the prosecutor in asserting its claim to the *locus in quo* consisted in warning the defendant to stay off the land, and in entering upon the land temporarily on a single occasion to erect a barbed wire fence thereon, which was designed solely to exclude the defendant from the land and which was forthwith removed by the defendant. Merely warning others not to go upon specific land does not constitute actual possession of such land. *Ruffin v. Overby,* 88 N.C. 369. The same observation applies to an isolated entry upon realty. *Currie v. Gilchrist,* 147 N.C. 648, 61 S.E. 581; *Williams v. Wallace,* 78 N.C. 354.

The only evidence presented by the State to show ownership of the *locus in quo* by the prosecutor consisted of the oral assertions of witnesses that the prosecutor bought the property from Zelma Rudd in May or June, 1947. This testimony fell far short of meeting the legal requirements for proving title to realty. *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142. This being so, there was no evidence tending to show constructive possession by the prosecutor.

The criminal complaint supporting the third warrant was drawn under G.S. 14-160 and charges the defendant with wantonly and willfully injuring "personal property belonging to New Bethel Church." The evidence offered by the State under this accusation tends to show an injury to a fence, which is, in law, a part of the realty. *S. v. Graves,* 74 N.C. 396. This discrepancy between the averments of the criminal complaint and the proof constitutes a fatal variance, and by reason thereof the motion of the defendant for judgment of nonsuit in the prosecution for injury to personal property ought to have been sustained in the trial court. *S. v. Law,* 227 N.C. 103, 40 S.E. 2d 699; *S. v. Forte,* 222 N.C. 537, 23 S.E. 2d 842; *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, 131 A.L.R. 143; *S. v. Stinnett,* 203 N.C. 829, 167 S.E. 63.

For the reasons given, the motions of the defendant for judgments of nonsuit in the several prosecutions are sustained on this appeal. These rulings have the force and effect of verdicts of not guilty in all three actions. G.S. 15-173.

Reversed.

BRIGHT BELT WAREHOUSE ASSOCIATION, INC., v. TOBACCO PLANTERS WAREHOUSE, INC., FARMERS WAREHOUSE, INC., FENNER'S WAREHOUSE, INC., EASLEY'S WAREHOUSE, INC., W. E. COBB, H. P. FOXALL, ROY M. PHIPPS, JIMMIE D. SMITH, R. J. WORKS, AND R. J. WORKS, JR.

(Filed 23 November, 1949.)

1. Associations § 1—

An association of tobacco warehousemen organized to encourage fair trade practices in the business, which has no definite procedure to determine membership, is a voluntary organization notwithstanding it is incorporated without capital stock, and given the right to sue and be sued.

2. Associations § 2—

Warehousemen who affiliate with the warehousemen's association, contribute to its support, attend its meetings and receive whatever benefits are derived, are members thereof notwithstanding that the association has promulgated no definite procedure to determine membership.

3. Associations § 3—

The charter and by-laws of an association constitute a contract between it and its members, and each member is deemed to have consented to all reasonable rules and regulations promulgated in accordance with its by-laws, which may be enforced by the association by injunction unless unreasonable, unlawful or contrary to public policy.

4. Same—

The delegation by an association of power to its board of governors to promulgate rules and regulations for the orderly marketing and handling of tobacco on the auction warehouse floors of its members is insufficient to give its board of governors power to prohibit auction sales altogether. Thus where its board of governors is delegated authority to regulate sales, a rule prohibiting sales unless attended by a buyer from each of three specified tobacco companies, is in excess of the delegated authority, and void.

BARNHILL, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Frizzelle, J.*, at September Term, 1949, of WAKE.

This suit was instituted to enjoin the defendants from conducting auction sales of leaf tobacco in their warehouses other than in accordance

with the rules and regulations promulgated by plaintiff's Board of Governors, and specifically to prevent defendants from selling tobacco during the season of 1949 without the presence of an adequate number of buyers as defined by the resolution of said Board. It was alleged that the defendants were members of plaintiff Association and under obligation to observe the rules properly determined and declared which pertain to the business of conducting auction sales of tobacco on warehouse floors. Upon the verified complaint a temporary restraining order and notice to show cause were issued. The defendants answered setting forth several defenses to plaintiff's suit, and on the hearing before Judge Frizzelle demurred *ore tenus* to the complaint and moved for judgment that on the facts alleged plaintiff was not entitled to continuance of the restraining order. The demurrer was overruled, the motion denied, and the restraining order continued until final judgment. Defendants excepted and appealed.

William T. Joyner and William T. Joyner, Jr., for plaintiff, appellee.

Battle, Winslow & Merrell and Spruill & Spruill for defendants, appellants.

DEVIN, J. The plaintiff bases its right to enjoin the defendants from violating rules promulgated by plaintiff's Board of Governors upon allegations that defendants are tobacco warehousemen engaged in the business of conducting sales of leaf tobacco by auction, and that this business has grown to such an extent that it became necessary that rules and regulations be established to prevent disorder and injury to growers and warehousemen alike; that to effectuate this purpose and to encourage fair trade practices plaintiff Corporation was organized. It was alleged that the defendants who operate fourteen warehouses in Rocky Mount, North Carolina, are members of or affiliated with plaintiff Association, and are under obligation to comply with all its reasonable rules and regulations.

It was stated in the complaint that in 1948 growers in North Carolina produced 750,000,000 pounds of flue cured bright-leaf tobacco which was sold under the auction system on warehouse floors for approximately $375,000,000, and it is alleged that in view of the expanded proportions of the industry and the keen competition between warehousemen and markets for the patronage of growers, and in order to carry out plaintiff's declared purpose of promoting the orderly marketing of tobacco and encouraging fair practices in the conduct of auction sales in the interest of growers, warehousemen and buyers, the plaintiff Association at its annual meeting June 6-8, 1949, adopted a resolution authorizing its Board of Governors to determine not later than July 1st market open-

ing dates, and "to announce and publish such rules and regulations as may in the opinion of the Board best provide for the proper and orderly marketing and handling of tobacco on auction warehouse floors." Pursuant to this delegation of authority the Board of Governors met June 30, 1949, and announced and published the opening dates of markets, and rules and regulations for "orderly marketing and handling tobacco on warehouse floors," which related to the speed of sales, the size of piles, and selling hours. On July 20 the Board of Governors again met and adopted the following resolution:

"1. That an essential element of a *bona fide* sale of tobacco at auction is that there shall be assigned to such sale an adequate set of buyers prepared to bid at the competitive sale. The minimum requirement of an adequate set of buyers is the following:

"(a) Buyers for each of the three major domestic tobacco companies (Reynolds Tobacco Company, American Tobacco Company, and Liggett & Myers Tobacco Company), and

"(b) Buyers of at least three other recognized companies purchasing tobacco for export or for export and domestic consumption.

"2. No warehouse should offer tobacco for sale at auction unless and until an adequate set of buyers as defined above has been assigned to and secured for such sale."

It was alleged that defendants have complied with all rules and regulations promulgated by plaintiff's Board of Governors except those referring to sales made in absence of an adequate set of buyers as defined by the plaintiff's Board of Governors; that four sets of buyers are assigned by the three major domestic companies to the Rocky Mount market, permitting four simultaneous sales on that market, but the defendants in addition thereto have conducted and continue to conduct an additional or fifth sale of tobacco on the floors of defendants' warehouses when the buyers present do not include representatives from each of the three major domestic companies; that notwithstanding requests from plaintiff and farm organizations to discontinue this practice the defendants have refused and have announced their purpose to continue such sales.

Plaintiff further alleges that defendants' failure to discontinue these additional sales will result in injury to the growers of tobacco in deficiency of price, and to the plaintiff and other members of plaintiff Association who are abiding by plaintiff's reasonable marketing regulations, and will cause dissatisfaction with the auction system of marketing tobacco; that such injury cannot be readily calculated in money, and is irreparable.

The defendants, answering, admit that they are proprietors of warehouses in Rocky Mount wherein auction sales of leaf tobacco are conducted, and that plaintiff Association has been incorporated for the purposes therein declared, but defendants say the plaintiff has no capital

stock and it has set up no definite procedure to determine membership; that it is merely a loose organization of warehousemen on a voluntary basis co-operating for a common end; that the defendants have not joined the plaintiff in any formal way, but they admit they are members of Eastern North Carolina Warehouse Association, and that with their knowledge a portion of the dues paid by defendants is allocated to plaintiff.

Defendants set out in their answer that on the Rocky Mount market, on defendants' floors, each season, for past five years, have been sold approximately 60,000,000 pounds of leaf tobacco; that this market has grown until on the basis of number of pounds sold it is second in size in Eastern North Carolina; that only four sets of buyers embracing representatives of each of the leading manufacturers have been assigned to this market, which under plaintiff's rule would have permitted only four simultaneous sales; that for the convenience and accommodation of the growers, and to handle the increasing volume of tobacco brought there for sale by growers, it was deemed necessary by defendants that an additional or fifth sale be conducted; that on this fifth sale representatives of American Tobacco Company and Liggett & Myers Tobacco Company have not been bidders, but it is denied the sales are conducted without substantial and competitive bidding, and it is denied that any injury has been caused or threatened to the tobacco farmers; that under the rule any grower may, if the price bid is not satisfactory, "turn his tag," decline to sell, and remove his tobacco elsewhere for sale; that on these additional sales the small proportion of tags turned is no greater than on other sales.

Defendants further allege that the action of plaintiff's Board of Governors in declaring that "no warehouse should offer tobacco for sale at auction until 'an adequate set of buyers' as defined above has been assigned to and secured for such sale," if intended to prohibit sales without the presence of such buyers, is beyond the power and authority of such Board, and in excess of the authority conferred on said Board by plaintiff corporation, and that the action of the Board in so declaring was *ultra vires,* and insufficient to authorize the court to restrain the defendants from conducting auction sales of tobacco voluntarily brought to them by growers for such sale, or to prevent sales which are participated in by growers, warehousemen and buyers in the exercise of their personal rights so to do without complaint; that the authority given the Board of Governors was to regulate, not to prohibit; that the resolution set out, if it constitutes authority to plaintiff's Board to prohibit sales, is in restraint of trade and violates statutory and constitutional rights, and is against public policy; that the requirements of the resolution of the Board of Governors that no sale be held without the presence of a representative of each of the three leading manufacturers is unreasonable, for that the

absence of a single buyer representing either of these manufacturers would prevent the sale from being held, thus delegating to these three manufacturers, or to any one of them, the power to veto auction sales altogether, and by failing to assign buyers to cripple or destroy the market. Defendants pray that the restraining order heretofore issued in this cause be dissolved.

From the pleadings herein summarized, it appears that the plaintiff is an association of tobacco warehousemen. Although incorporated without capital stock, and given legal entity with power to sue and be sued, it is nevertheless a voluntary association organized primarily for the benefit of those engaged in this business. While apparently there is no definite criterion or procedure for determining membership therein, it would seem that those engaged in the business who affiliate with the plaintiff, contribute to its support, attend its meetings and receive whatever benefits are derived, may properly be regarded as members thereof.

It follows that the articles of association for the purposes expressed in the charter and the by-laws of the plaintiff constitute a contract between plaintiff and its members which imposes certain obligation on the members among themselves and with respect to the association or corporation. Hence, as a consequence of membership in an incorporated association for mutual benefit, each member is deemed to have consented to all reasonable rules and regulations pertaining to the conduct of the business which have been properly determined and promulgated, and it is well settled that the enforcement of rules and regulations which are not unreasonable, immoral, unlawful, or contrary to public policy, affords ground for judicial action and relief by injunction. 4 A.J. 459, 460; 7 C.J.S. 34; *Booker & Kinnaird v. Louisville Board of Fire Underwriters,* 188 Ky. 771, 21 A.L.R. 531. In *Gray v. Warehouse Co.,* 181 N.C. 166, 106 S.E. 657, this Court upheld the principle that the business of operating warehouses for the public marketing of tobacco was one affected with a public interest and subject to reasonable public regulations, and in a concurring opinion by *Justice Hoke* it was said that "subject to such reasonable rules and regulations as may be established by the public agencies, and when not interfering with same, the authorities in control and management of these warehouses have the power to establish for themselves such reasonable rules and regulations as may be required to promote business efficiency and insure fair and honest dealing in the transactions occurring there."

Applying these principles to the facts here pleaded, we think the defendants were members of plaintiff Association and under obligation to comply with reasonable rules pertaining to the conduct of sales under the auction system in the warehouses operated by them, and that the resolution of June 6-8, 1949, duly adopted in a meeting of the members

of plaintiff Association, and in which some of these defendants participated, was a valid exercise of a power resting in the plaintiff by the consent of its members and was and is binding upon the defendants. By this resolution the plaintiff Association authorized and directed its Board of Governors, after investigation and consultation as to what would best serve the growers and achieve orderly marketing, to determine not later than July 1st the opening dates of the several markets in the Bright Belt, and "to announce and publish such rules and regulations as may in the opinion of the Board best provide for properly and orderly marketing and handling of tobacco on the auction warehouse floors." Under this authority the Board of Governors met prior to July 1st, fixed the dates for the opening of various tobacco marketing belts and announced the rules for handling and marketing tobacco on warehouse floors about which there is no controversy. But subsequently the Board of Governors again met July 20, and adopted the resolution hereinbefore set out that "no warehouse should offer tobacco for sale at auction unless and until an adequate set of buyers as defined above has been assigned to and secured for such sale."

The plaintiff's right to enjoin additional sales of tobacco in Rocky Mount is based upon this resolution of the Board of Governors. Whether the Board of Governors should be held to have exhausted its delegated authority to act after July 1st, or whether the word "should" ought to be regarded as recommendatory rather than mandatory and prohibitive, we need not determine on this record as we are of the opinion that the resolution of June 6-8, 1949, wherein authority was delegated to the Board of Governors to promulgate regulations as to marketing and handling tobacco, was insufficient to give this Board power altogether to prohibit an auction sale of tobacco, otherwise regular and fair and in accord with announced marketing regulations, because of the absence of buyers of either of three named manufacturers.

Since we hold that the regulation contained in the resolution of the Board of Governors July 20, 1949, was beyond its delegated powers, in so far as it attempted to prohibit auction sales of tobacco in defendants' warehouses in excess of the four now permitted, we do not reach the question whether it was an unreasonable regulation, and an infringement upon defendants' rights. Nor, under this view, it being admitted defendants are complying with the other regulations properly determined and announced by plaintiff's Board as to the marketing and handling of tobacco in defendants' warehouse, are the questions as to unreasonable restraint of trade or interference with interstate commerce presented.

No question is raised in this case as to the *bona fides* of the plaintiff Association or that of its Board of Governors.

The plaintiff's suit was to enjoin the defendants from conducting additional sales, as herein defined, for the season of 1949. Since the tobacco selling season for this year has ended, the relief sought by plaintiff in any event would now be nugatory, which would ordinarily leave only a moot question for decision. However, in view of the importance of the questions presented, we have deemed proper to express the Court's opinion on the matters herein discussed.

We conclude upon consideration of the facts pleaded that the restraining order should have been dissolved, and that the order continuing the restraining order to final judgment must be

Reversed.

BARNHILL, J., took no part in the consideration or decision of this case.

SOUTHERN RAILWAY COMPANY v. MECKLENBURG COUNTY AND JESSIE C. SMITH, TREASURER OF MECKLENBURG COUNTY.

(Filed 23 November, 1949.)

1. Counties § 1—

A county is a governmental unit of the State stemming from the common law and existing for the purpose of maintenance of law and order and to assure a large measure of local self-government. N. C. Constitution, Art. VII, sec. 1.

2. Counties § 2—

What is necessary in the discharge by a county of its governmental functions is largely within the discretion of the governing board of the county, subject to legislative limitations, and a county may levy taxes within constitutional limitations to provide funds necessary to the discharge of its governmental functions without legislative intervention.

3. Same—

An indispensable governmental function of a county is to secure the public safety by enforcing law, maintaining order, preventing crime, apprehending criminals, and protecting its citizens in their person and property, which function the county officials have no right to disregard and no authority to abandon.

4. Same—

While the Legislature has authority to place any group of law enforcement officers in a county under the supervision of an agency other than the sheriff, its action in doing so does not alter the essential nature of their work nor the purpose of expenditures for their maintenance.

5. Taxation § 2—

A purpose which involves a regularly recurring expenditure in the performance of a duty or the exercise of a power which is essential to government and which has been delegated to the county unit of government, is a general rather than a special purpose within the meaning of Art. V, sec. 6, of the Constitution of N. C.

6. Same—

Expenditures by a county for maintenance of a rural police force is for a continuing expense in furtherance of an indispensable function of county government, and therefore is for a general county purpose within the meaning of the constitutional limitation on the tax rate for such purposes. Constitution of N. C., Art. V, sec. 6.

APPEAL by defendants from *Bobbitt, J.,* in Chambers, 8 October 1949, MECKLENBURG. Affirmed.

Civil action to recover *ad valorem* taxes alleged to have been wrongfully levied and collected.

In 1917 the Board of Commissioners of Mecklenburg County, acting under legislative authority, created and organized a rural police force under the general control and direction of the sheriff of the county "to patrol and police the County; to detect and prevent the violation of the criminal laws . . . to make arrests . . . to report his acts in all known or suspected violations of the criminal laws to the Sheriff of the County . . ."

The Legislature, by Chap. 612, P.L.L. 1925, transferred the supervision of this police force from the sheriff to the Board of County Commissioners. Later, supervisory power was vested in a Civil Service Board, the members of which are appointed by the resident judge. Chap. 20, P.L.L. 1933; Chap. 75, P.L.L. 1935.

Until 1947 the rural police force was maintained out of the general fund of the county. In that year, by Chap. 638, Session Laws 1947, the Legislature declared the maintenance of the rural police force "a special purpose" and authorized the Board of County Commissioners "to annually levy, impose and collect special taxes upon all taxable property in said county not to exceed ten cents (10c) upon each one hundred dollars ($100.00) of valuation of such property and over and above any taxes allowed by the constitution, for the special purpose of paying the costs and expenses of the maintenance and operation of a rural police force in said county."

Pursuant to this authority the County Board of Commissioners levied for the year 1947 $.0757 for said "special purpose," the assessment against plaintiff being in the sum of $3,276.86. Plaintiff paid the assessment made against it under protest and now sues to recover.

In the court below the plaintiff moved for judgment on the pleadings. Upon hearing the motion, the court found and concluded "that the expense of maintaining the rural police force in Mecklenburg County is an annually recurring expense for the general purpose of law enforcement within the said County, and that it is not a special purpose within the meaning of Article V, Section 6 of the Constitution." It further found that $.0202 of said levy comes within the total permissible levy for general purposes. Thereupon, judgment was entered for the excess in the sum of $2,402.45, with interest, and defendant excepted and appealed.

W. T. Joyner, Robinson & Jones, and John M. Robinson, Jr., for plaintiff appellee.

Taliaferro, Clarkson & Grier for defendant appellants.

BARNHILL, J. That the cost of maintaining a rural police force in Mecklenburg County for the better enforcement of the law and the security of the public safety is a necessary expense of county government is conceded. Is it a "general purpose" or a "special purpose" expense within the meaning of Art. V, sec. 6 of the Constitution? This is the one question posed for decision. The court below answered in favor of plaintiff. In this conclusion we concur.

The creation of counties as subdivisions of the state originated in England even before the organization of the kingdom itself. *Bignell v. Cummins,* 36 A.L.R. 634; 14 A.J. 185. Their existence and their functions in the administration of the law were so well recognized that those who drafted our original Constitution did not deem it necessary to provide for their creation or to define their powers. Instead, they assumed their existence as a constituent part of the state government. N. C. Const. of 1776, sec. 38; N. C. Const., Art. VII, sec. 1.

They are subdivisions of the State, established for the more convenient administration of government and to assure a large measure of local self-government. Their powers which are intrinsically governmental stem from the common law. Legislative acts supplement, modify, or curtail those powers to meet the needs of a changing civilization. Generally speaking they possess such governmental powers as are necessary to be exercised in the enforcement of the law, the maintenance of the peace, and the protection of the people within their boundaries, subject to such limitations as the Legislature may deem it wise to impose, 14 A.J. 185, and are vested by the Constitution with the power to tax for these purposes. N. C. Const., Art. V, sec. 6.

In the absence of legislative direction or limitation, what is needful in the discharge of these intrinsically governmental functions is largely within the discretion of the governing board of the county, and it may

levy taxes, within constitutional limitations, to provide the necessary funds, without legislative intervention.

One of the primary duties of the county, acting through its public officers, is to secure the public safety by enforcing the law, maintaining order, preventing crime, apprehending criminals, and protecting its citizens in their person and property. This is an indispensable function of county government which the county officials have no right to disregard and no authority to abandon.

The sheriff is the chief law enforcement officer of the county. 47 A.J. 839; 57 C.J. 779. Yet it may not be gainsaid that the Legislature has authority to place any group of law enforcement officers in a county under the supervision of some other agency. *Commissioners v. Stedman,* 141 N.C. 448. Even so, the essential nature of their work and the purpose of the expenditures for their maintenance remain the same, whether they are directed by the sheriff, the board of commissioners, or some other agency. Neither the county nor the Legislature can enlarge the taxing power of the county under the provisions of Art. V, sec. 6 of the Constitution by merely making the law enforcement agency of the county independent, in whole or in part, of the sheriff's office.

We come then to this question: Are taxes levied to provide funds for the maintenance of law enforcement officers levied for a general or a special purpose? The answer would seem self-evident.

"Definitions build fences around words." Therefore, prudence dictates caution in attempting to give an all-inclusive definition of "general purpose." Suffice it to say that a purpose which involves a regularly recurring expenditure, in the performance of a duty or the exercise of a power which is essential to government and which has been delegated to the county unit of government—such as the enforcement of the law and the administration of justice—is a general rather than a special purpose as that term is used in the Constitution. *Power Co. v. Clay County,* 213 N.C. 698, 197 S.E. 603; *Henderson v. Wilmington,* 191 N.C. 269, 132 S.E. 25.

The rural police force of Mecklenburg County was organized and is being maintained to secure the public safety. This is emphasized by allegations in the answer. Members of the force in 1947 made 4,984 arrests for traffic violations and 2,955 arrests for other causes. They made 1,226 major investigations, recovered stolen property of the value of $59,684.70, and procured convictions which netted $105,860.89 in fines and forfeitures and $18,011.70 in court costs. The funds for its maintenance must be raised by a tax levied from year to year and expended from month to month. The expense is continuing and is in furtherance of an indispensable function of county government. Necessarily then, the tax is levied for a general rather than a special purpose.

The defendants have made a laudable and seemingly successful effort to create and maintain a law enforcement agency entirely removed from the realm of politics. In so doing, however, they did not convert a "general purpose" service into a "special purpose" activity and thereby increase the taxing power of the county.

The judgment of the court below is

Affirmed.

STATE v. AUDIE LEE BROWN.

(Filed 23 November, 1949.)

1. Criminal Law § 33—

Where defendant offers no testimony on the preliminary inquiry and the State's evidence does not show that defendant's confession was involuntary, defendant's exception to the admission of the confession in evidence cannot be sustained.

2. Homicide § 27h: Criminal Law § 53g—

Where all the evidence tends to show murder committed in the perpetration of a robbery, the court is not required to submit the question of defendant's guilt of the lesser offense of murder in the second degree G.S. 14-17.

APPEAL by defendant from *Coggin, Special Judge,* March Special Term, 1949, of RANDOLPH.

Criminal prosecution on indictment charging the defendant with the murder of one Melvin Cain.

On Sunday morning, 2 January, 1949, the body of Melvin Cain was found lying, face down, in an old woods road in Randolph County. He had been shot in the back of the neck with a shotgun.

Audie Lee Brown confessed to the sheriff that he had told the deceased on Friday before where he could buy a calf. He was in the business of cattle buying. The defendant then appeared at the home of the deceased on Saturday morning with his dog and gun, telling the deceased he wanted to do some hunting. They went down the old road in question, the deceased thinking he was going to buy a calf, and the defendant pretending to be off on a hunt. They soon came to a washed-out place in the road. The defendant stepped behind the deceased, as it was too narrow to walk side by side, and "I shot him as I stepped behind him, at close range." The defendant further stated to the sheriff that "he killed him for his money." Bills taken from the deceased were found in the possession of the defendant.

The defendant objected to the introduction in evidence of his confession to the sheriff. The court found that it was voluntarily made. Exception. The defendant offered no testimony on the preliminary inquiry.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

J. G. Prevette for defendant.

STACY, C. J. The defendant has been convicted of murder in the first degree, with no recommendation from the jury, and sentenced to die as the law commands in such cases. He appeals principally upon his challenge to the admission in evidence of his confession to the sheriff. The court's ruling is amply supported by the record. *S. v. Hammond,* 229 N.C. 108, 47 S.E. 2d 704; *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620.

There was nothing in the State's evidence to show involuntariness, and the defendant offered no testimony on the preliminary inquiry. *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11; *S. v. Richardson,* 216 N.C. 304, 4 S.E. 2d 852; *S. v. Smith,* 213 N.C. 299, 195 S.E. 819; *S. v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24. Moreover, the confession is supported by the sheriff's discoveries in consequence of what the defendant told him. *S. v. Hammond, supra; S. v. Brooks,* 225 N.C. 662, 36 S.E. 2d 238; *S. v. Wise,* 225 N.C. 746, 36 S.E. 2d 230; *S. v. Grass,* 223 N.C. 31, 25 S.E. 2d 193; *S. v. Smith, supra; S. v. McRae,* 200 N.C. 149, 156 S.E. 800. But, then, the truth or correctness of the confession is not challenged. Only its voluntariness is questioned, and this exclusively on the State's showing. *S. v. Moore,* 210 N.C. 686, 188 S.E. 421, and cases there cited.

The defendant also complains because the court did not submit the lesser degree of murder in the second degree. However, as the defendant, according to his own confession, slew the deceased in the perpetration of a robbery, the law pronounces his crime murder in the first degree. G.S. 14-17; *S. v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352; *S. v. Smith,* 223 N.C. 457, 27 S.E. 2d 114; *S. v. Williams,* 216 N.C. 446, 5 S.E. 2d 314; *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11; *S. v. Exum,* 213 N.C. 16, 195 S.E. 7; *S. v. Donnell,* 202 N.C. 782, 164 S.E. 352; *S. v. Covington,* 117 N.C. 834, 23 S.E. 337.

On the record as presented, no reversible error has been made to appear. Hence, the verdict and judgment will be upheld.

No error.

R. L. PENNY v. VIRGINIA N. NOWELL, ET AL.

(Filed 23 November, 1949.)

1. Vendor and Purchaser § 7—

Where the vendor disavows the contract, the purchaser is not required to tender the purchase price within the period of the option, since the law does not require the doing of a vain thing.

2. Vendor and Purchaser § 25a—

In plaintiff's action to cancel contract of record, defendant set up a counterclaim for breach of a provision therein giving defendant the right to purchase or sell specified property for a stipulated price within a period of thirty days after termination of the contract. The defendant testified that within the period of the option she obtained a purchaser able and willing to buy the property at a price in excess of that stipulated in the option, and that plaintiff refused to consider the offer or make deed on the ground that the contract was void. *Held:* The granting of nonsuit on the counterclaim was error.

APPEAL by defendant from *Stevens, J.*, May Term, 1949, of WAKE.

Civil action to cancel contract of record or to remove it as a cloud on plaintiff's title.

The contract provided that if after 15 May, 1947, the plaintiff desired to terminate the agreement between them, the defendant would have the privilege of purchasing or selling the property in question at a price of $15,000.00 within a period of thirty days thereafter.

Plaintiff notified the defendant on 14 May, 1947, that he considered the contract void. Defendant testified that within the period of the option she secured a purchaser ready, able and willing to buy a part of the property at a price of $20,000, so informed the plaintiff and demanded that deed accordingly be executed and delivered.

The plaintiff declined to consider the offer or to make deed to the property, contending that the contract was null and void, and told the defendant that if she expected to deal with him concerning the property, another contract would have to be made.

The defendant set up a counterclaim for breach of the contract, and demanded damages in the sum of $20,000.

As no tender of the purchase price was made by the defendant within the stipulated period, the court entered judgment of nonsuit on defendant's counterclaim and directed a verdict for the plaintiff and rendered judgment that the paper-writing be canceled of record.

The defendant appeals, assigning errors.

Simms & Simms for plaintiff, appellee.

John W. Hinsdale and J. C. Little, Jr., for defendants, appellants.

STACY, C. J. The plaintiff's disavowal of the contract relieved the defendant of the necessity of tendering the purchase price within the period of the option. Such a tender would have availed nothing according to the testimony of record. The law does not require the doing of a vain thing. The disavowal was a waiver of the requirement. *Phelps v. Davenport,* 151 N.C. 22, 65 S.E. 459; *Gaylord v. McCoy,* 161 N.C. 685, 77 S.E. 959.

In this view of the matter, the evidence was quite sufficient to carry the case to the jury on the defendant's counterclaim. *Crotts v. Thomas,* 226 N.C. 385, 38 S.E. 2d 158; *Trust Co. v. Frazelle,* 226 N.C. 724, 40 S.E. 2d 367; *Cunningham v. Long,* 186 N.C. 526, 120 S.E. 81. Hence, the dismissal of the counterclaim will be reversed, and the directed verdict and judgment for plaintiff set aside and a general new trial ordered.

Reversed and new trial.

MRS. VIOLA F. PARLIER v. G. D. DRUM.

(Filed 23 November, 1949.)

Appeal and Error § 40f—

While ordinarily the Supreme Court will not attempt to chart the course of the trial upon appeal from denial of motion to strike allegations from the pleadings, in this action *ex contractu,* denial of motion, made in apt time, to strike allegations from the complaint alleging improper and annoying conduct on the part of defendant causing plaintiff nervous prostration and necessitating medical treatment, is reversed, since the reading of the pleadings would tend to prejudice defendant.

APPEAL by defendant from *Coggin, Special Judge,* March Term, 1949, of MECKLENBURG. Modified and affirmed.

Orr & Hovis for plaintiff, appellee.

McDougle, Ervin & Horack for defendant, appellant.

DEVIN, J. The defendant appealed from the denial by the court below of his motion to strike certain portions from the plaintiff's complaint.

In her complaint plaintiff alleged that she was induced by the defendant to pay $2,500 as part payment on the purchase price of certain real property in Charlotte, the defendant paying $5,000 and taking title thereto in his own name, and that defendant had agreed at the time that title would be made to her upon repayment of the amount defendant had contributed. She alleged that defendant has now repudiated their agree-

ment, and she prays that she recover of defendant $2,500, and that he be declared to hold the property in trust for her to the extent of her payments.

The defendant in apt time moved to strike certain portions from the plaintiff's complaint on the ground that they were irrelevant and not necessary to the plaintiff's statement of her cause of action. He contends that these were inserted for the purpose of prejudicing him and if allowed to remain would have a harmful effect when read in the hearing of the jury at the trial. The court allowed defendant's motion in part and declined to strike certain other portions of the complaint, including paragraph 19. From an examination of this paragraph we observe that it consists of allegations of improper and annoying conduct on the part of the defendant toward the plaintiff personally, causing nervous prostration, necessitating treatment by a physician, and forcing her to seek protection from the police against the defendant. This seems foreign to the cause of action alleged and likely to prove prejudicial to the defendant.

While, under the rule, an appeal will lie from the denial of a motion to strike if made before time for answering has expired (G.S. 1-153), it has been repeatedly declared that this Court will not on such appeal undertake to chart the course of the trial in advance, and that the competency and relevancy of matters set out in the pleadings can be more properly determined when the evidence is offered. *Parker v. Duke University,* 230 N.C. 656, 55 S.E. 2d 189; *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308; *Hildebrand v. Tel. Co.,* 216 N.C. 235, 4 S.E. 2d 439; *Scott v. Bryan,* 210 N.C. 478 (482), 187 S.E. 756; *Hardy v. Dahl,* 209 N.C. 746, 184 S.E. 480; *Pemberton v. Greensboro,* 205 N.C. 599, 172 S.E. 196. In the recent case of *Terry v. Ice & Coal Co., ante,* 103, in the opinion by *Chief Justice Stacy* it was said: "While extraneous matters in a pleading may invite or attract a motion to strike, this does not put the pleader in a strait-jacket in respect of pertinent allegations. Nor is it the province of an appeal in such cases to have the Court chart the course of the trial in advance." However, we think the allegation complained of in the case at bar falls within the rule against including irrelevant charges against an adversary in the pleadings which when read before the jury at the trial may result in substantial prejudice. *Herndon v. Massey,* 217 N.C. 610, 8 S.E. 2d 914; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412; *Ellis v. Ellis,* 198 N.C. 767, 153 S.E. 449.

The court below ruled properly on defendant's motion except that we think paragraph 19 of the complaint should have been stricken.

Except as herein modified the judgment is affirmed.

Modified and affirmed.

MAMIE STOWE v. THE CITY OF GASTONIA, A MUNICIPAL CORPORATION, AND GASTONIA COMBED YARN CORPORATION.

(Filed 23 November, 1949.)

Municipal Corporations § 15b: Waters and Watercourses § 3: Nuisances § 3d—

The complaint alleged that defendant corporation discharged industrial wastes into a stream above plaintiff's property and that defendant municipality discharged sewage therein, and that the several, joint and concurrent acts of both defendants rendered the waters of the creek polluted and constituted a continuing trespass and nuisance to the damage of plaintiff's property. *Held:* Demurrer on the ground of misjoinder of parties and causes was properly overruled.

APPEAL by defendants from *Bobbitt, J.*, at August Civil Term, 1949, of GASTON.

Civil action to recover damages allegedly resulting from a nuisance, created by the several, joint and concurrent acts of defendants as set forth in the complaint, and for injunction against continuance of such acts.

Plaintiff alleges in her complaint: That she is the owner of a certain tract of land situated on Catawba Creek, in Gaston County, North Carolina; that, prior to the acts hereinafter described, the water of said creek, as it flowed through, and adjacent to the lands of the plaintiff, was free of industrial wastes, noxious odors, sewage and poisonous substances, etc.; that defendant, Gastonia Combed Yarn Corporation, has constructed, maintains and uses a pipe line from one or more of its factories to Catawba Creek, and through said line discharges into said creek above the land of plaintiff wastes from its manufacturing processes,—sodium hydroxide, caustic sodas, dyes, chemicals and industrial wastes; that defendant, City of Gastonia, owns, maintains and operates a sewer system which carries sewage and other wastes to, and empties same into the sewage disposal plant, owned, maintained and operated by it, and located on Catawba Creek above the land of plaintiff; that the said disposal plant discharges its wastes into Catawba Creek; "that the defendant City, through its sewer system and sewage disposal plant, and the defendant, Gastonia Combed Yarn Corporation, through its pipe line, are now and have been for several years past discharging into Catawba Creek substances as hereinbefore set out so that the two defendants have joined together and contaminated the waters of Catawba Creek so that by the several, joint and concurrent acts of both defendants the waters of said creek have become polluted and filled with a filthy sediment, impregnated with foul, nauseating and abhorrent stenches and odors, etc.," such as to constitute a continuing trespass and a nuisance, to the damage of plaintiff in substantial amount.

Defendants demurred to the complaint upon the ground that there is a misjoinder (1) of parties, and (2) of causes of action. The demurrers were overruled, and defendants appeal to the Supreme Court and assign error.

Tillett & Campbell and Wade H. Sanders for plaintiff, appellee.

Ernest R. Warren for City of Gastonia.

George B. Mason and Cherry & Hollowell for Gastonia Combed Yarn Corporation, defendants, appellants.

WINBORNE, J. There is striking similarity in the allegations contained in the complaint in the present action and those set forth in the complaints in the case of *Moses v. Town of Morganton, and others,* reported in 192 N.C. 102, 133 S.E. 421, and in the case of *Lineberger v. City of Gastonia, and others,* reported in 196 N.C. 445, 146 S.E. 79. It is there held, under similar circumstances and conditions, that there was no misjoinder of parties or of causes of action.

The cases of *Hampton v. Spindale,* 210 N.C. 546, 187 S.E. 775, and *Clinard v. Town of Kernersville,* 215 N.C. 745, 3 S.E. 2d 267, upon which appellants rely, are distinguishable in factual situation.

Hence, upon the authority of *Moses v. Morganton, supra,* and *Lineberger v. Gastonia, supra,* in pertinent aspect, the demurrers were properly overruled.

Affirmed.

IRA S. NICHOLS v. WACHOVIA BANK & TRUST COMPANY.

(Filed 23 November, 1949.)

1. Appeal and Error § 38—

The burden is upon appellant not only to show error, but also that the alleged error was prejudicial.

2. Appeal and Error § 39b—

Where, in an action against a safe deposit company for alleged negligence resulting in the loss of specified personalty from the safe deposit box, the jury finds under instructions not excepted to that plaintiff did not have the property in the safe deposit box at the time in question, any errors in instructions in regard to the duty of a safe deposit company to a customer, are harmless.

DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Harris, J.,* and a jury, at the May Term, 1949, of WAKE.

The parties agree that during 1948 the plaintiff rented a safe-deposit box from the defendant, which operates a bank at Raleigh, North Carolina.

The plaintiff sued the defendant upon a complaint alleging that on or about 5 January, 1948, the contents of such safe-deposit box, to wit, $3,500.00 in money, were lost as the result of the negligence or wrongful acts of the employees in charge of defendant's safe-deposit department. The answer denied that the plaintiff had left any money in the safe-deposit box, and pleaded other defenses.

Both parties presented evidence at the trial in support of their respective pleadings, and the court submitted the controversy between them to the jury upon issues tendered by the plaintiff. The jury found on one of the issues that the plaintiff did not have the money in the safe-deposit box at the time named in the pleadings, and refrained from answering the other controversial issues. The court entered judgment on this verdict exonerating the defendant from liability to the plaintiff, and the plaintiff appealed.

J. L. Emanuel for plaintiff, appellant.

Smith, Leach & Anderson, James K. Dorsett, Jr., A. J. Fletcher, and F. T. Dupree, Jr., for defendant, appellee.

ERVIN, J. If an appellant would be successful in this Court in his quest for relief against a judgment of the Superior Court, he must show either by the record proper or by the case on appeal these two things: (1) That the trial court committed an error; and (2) that such error was harmful to him. *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520. This is true because this Court disregards errors which do not prejudice substantial rights of litigants.

The plaintiff asserts that the trial court erred in its charge by failing to instruct the jury with the accuracy and completeness required by G.S. 1-180 as to the duty which a safe-deposit company owes to a customer with respect to property left in a safe-deposit box, and as to the liability of a safe-deposit company to a customer for acts of agents resulting in the loss of the contents of a safe-deposit box. For the purpose of this particular decision, it is assumed that the charge is justly subject to this criticism.

The plaintiff does not complain, however, in respect to the instructions of the court on the issue as to whether the plaintiff actually had money in the safe-deposit box at the time named in the pleadings. In consequence, the finding of the jury on this issue is binding on this appeal, and establishes these two ultimate facts: (1) That the money mentioned in the complaint was not left in the safe-deposit box by plaintiff; and (2)

that the plaintiff did not suffer the loss of the contents of the safe-deposit box as a result of the acts of the employees in charge of the defendant's safe-deposit department.

This being true, the plaintiff sustained no injury on account of the failure of the trial court to give the jury proper instructions as to what the duty and liability of the defendant would have been if these non-existent matters had been actualities. Hence, the appeal is unavailing for the reason that a failure to give proper instructions to the jury is necessarily harmless, when the verdict shows that there is no resulting injury. *Supply Co. v. Board of Education,* 199 N.C. 575, 155 S.E. 252; *Bryant v. Stone,* 178 N.C. 291, 100 S.E. 578; *Bond v. R. R.,* 175 N.C. 606, 96 S.E. 22; *Lloyd v. R. R.,* 166 N.C. 24, 81 S.E. 1003; *Dale v. R. R.,* 132 N.C. 705, 44 S.E. 399.

For these reasons, there is in a legal sense

No error.

DEVIN, J., took no part in the consideration or decision of this case.

F. B. CARPENTER AND WIFE, MARY CARPENTER, AND R. L. CARPENTER v. HORACE YANCEY AND DAISY YANCEY AND H. S. JOYNER.

(Filed 23 November, 1949.)

Frauds, Statute of, § 15—

Nonsuit is properly entered in an action on a contract relating to the sale of realty when plaintiff introduces only oral evidence of the alleged written agreement.

APPEAL by plaintiffs from *Bobbitt, J.,* September Term, 1949, of GASTON. Affirmed.

J. L. Hamme for appellants.

Ernest R. Warren for defendants, appellees.

PER CURIAM. This was an action to recover of the defendants damages for breach of contract relative to the purchase of a house and lot in Gastonia. The case on appeal recites "writings purporting to set forth the terms of the contract were signed and exchanged." On the trial the plaintiffs offered the oral testimony of one of the plaintiffs but declined to offer the written contract. The court held plaintiff had failed to make out a case, and entered judgment of nonsuit. We affirm.

JOAN ANNETTE FOY, BY HER NEXT FRIEND, THOMAS G. LANE, JR., v. FOY ELECTRIC COMPANY.

(Filed 23 November, 1949.)

Parent and Child § 3b—

In an action in tort by an infant against a corporation, allegations of the answer setting up the defense that the infant's parents were majority stockholders in the corporation and that to the extent of such stock ownership the action was in tort by an infant against its parents, *held* properly stricken on motion aptly made under authority of *Wright v. Wright*, 229 N.C. 503.

APPEAL by defendant from *Armstrong, J.*, at 2 May, 1949, Regular Term of MECKLENBURG.

Civil action to recover for damages for alleged actionable negligence of defendant in the operation of its truck by its servant and agent, Howard J. Foy.

The case was heard upon motion of plaintiff to strike from defendant's further answer these averments: (1) That at the time referred to in the complaint the infant plaintiff was daughter of said Howard J. Foy,—living in his household as a member of his family; (2) that Howard J. Foy and his wife, the mother of infant plaintiff, own one-half of the outstanding stock of defendant corporation; and (3) that, to the extent of his stock ownership in the corporation, the action is in effect against Howard J. Foy by his infant daughter, the maintenance of which is against public policy. The presiding judge allowed the motion to strike paragraph two and three, but disallowed it as to the remaining paragraph.

Defendant appeals to Supreme Court and assigns error.

McDougle, Ervin & Horack and Frank W. Snepp, Jr., for plaintiff, appellee.

Robinson & Jones and John M. Robinson, Jr., for defendant, appellant.

PER CURIAM. The action of the court in striking paragraphs two and three is accordant with the principle enunciated and applied in *Wright v. Wright*, 229 N.C. 503, 50 S.E. 2d 540. Hence, the ruling from which appeal is taken is

Affirmed.

STATE v. MONROE MEDLIN.

(Filed 23 November, 1949.)

Criminal Law § 80b (4)—

Where defendant fails to serve case on appeal within the time allowed and takes no steps to perfect his appeal, the motion of the Attorney-General to docket and dismiss will be allowed, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to disclose error.

APPEAL by defendant from *Bobbitt, J.*, at August Term, 1949, of MECKLENBURG.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

No counsel contra.

PER CURIAM. The defendant was convicted of murder in the first degree. Sentence of death by asphyxiation was imposed. Defendant gave notice of appeal. No case on appeal was served within the time allowed by the court below, and counsel for defendant in the trial below have notified the Clerk of the Superior Court of Mecklenburg County that they do not "plan to take any further action with reference to the appeal."

The Attorney-General moves to docket and dismiss the appeal. The motion must be allowed, but, according to the usual rule of the Court in capital cases, we have examined the record to see if any error appears. We find no error therein. *S. v. Watson,* 208 N.C. 70, 179 S.E. 455.

Judgment affirmed.

Appeal dismissed.

RALPH C. CLONTZ, JR., v. JAMES R. PURSER, TRADING AS PURSER'S ESSO SERVICE.

(Filed 23 November, 1949.)

Negligence § 4f (2)—

Nonsuit *held* properly entered in an action by a customer to recover for the burning of his coat which caught fire as he passed a red hot stove in defendant's place of business.

APPEAL by plaintiff from *Armstrong, J.*, at June Term, 1949, of MECKLENBURG.

Civil action to recover damages allegedly resulting from the negligence of the defendant.

While he was an invitee in defendant's place of business, plaintiff's overcoat caught fire and was rendered useless. The stove in the building was red hot. Apparently the overcoat caught fire as plaintiff passed by the stove on his way from the men's room. The condition of the stove was apparent to anyone who chose to look.

The court, at the conclusion of the plaintiff's evidence in chief, entered judgment as in case of nonsuit and plaintiff appealed.

Plaintiff appellant in propria persona.

Robinson & Jones and John M. Robinson, Jr., for defendant appellee.

PER CURIAM. We concur in the conclusion of the court below that the testimony offered fails to show actionable negligence on the part of the defendant such as would require submission of issues to a jury. Therefore, the judgment entered is

Affirmed.

STATE v. JOHN ROBERT BRIDGES, ALIAS JACK BRIDGES.

(Filed 30 November, 1949.)

Homicide § 27b: Criminal Law §§ 53b, 81c (2)—Charge construed contextually held not prejudicial as withdrawing question of innocence from jury.

Defendant entered a plea of not guilty. Defendant's confession, admitted in evidence without objection, disclosed a clear case of premeditated and deliberate murder. The State contended for a verdict of murder in the first degree and defendant contended that a verdict of murder in the second degree would meet the ends of justice. The court correctly charged on the presumption of innocence and in several portions of the charge instructed the jury that it was to pass upon the guilt or innocence of defendant, but in the final instructions charged the jury to take the case and say whether defendant was guilty of murder in the first degree or murder in the second degree. *Held:* The failure of the court to charge in each instance that the jury might find the defendant not guilty does not constitute prejudicial error in the light of the record, construing the charge in its entirety.

ERVIN, J., dissenting.

SEAWELL, J., concurs in dissent.

BARNHILL, J., concurring.

APPEAL by defendant from *Burgwyn, Special Judge,* April Term, 1949, of WAKE.

STATE *v.* BRIDGES.

Criminal prosecution on indictment charging the defendant with the murder of one Keston Norris Privette.

The record discloses that on 7 February, 1949, the defendant lured the deceased from his home, bludgeoned him over the head with the stock of a rifle, and buried him, while still alive, in a shallow hole or grave which the defendant previously had prepared for the purpose. He died from suffocation. The defendant and the wife of the deceased then fled to the State of Georgia. While under arrest in that State, the defendant made a confession to the officers in which he freely admitted the atrociousness of the crime and the sordid details of his illicit relations with the youthful wife of the deceased. Under this confession, which is not now challenged, a clear case of premeditated and deliberate murder is fully made out.

While the defendant entered a plea of not guilty, the case was argued to the jury on the opposing contentions, first by the State that a verdict of murder in the first degree should be returned against the defendant, and, secondly, by the defendant that a verdict of murder in the second degree would meet the ends of justice.

In opening his charge to the jury, the trial court instructed them that they were to pass upon the "guilt or innocence of the prisoner" and to say by their verdict the degree of guilt the prisoner has incurred by reason of the homicide in question, "or to say by your verdict that he is not guilty of any crime," as you may find the facts to be from the evidence in the case and under the rule of law which the court will undertake to give you for your guidance.

Then when the court came to consider the different degrees of an unlawful homicide, he addressed the following inquiry to the defendant and his counsel:

"I do not understand—and if I misunderstand I wish now to be corrected—that the defendant contends, either in his own proper person or through counsel, that this jury should render any less verdict than that of murder in the second degree: Is that correct, gentlemen?

"Mr. Holding: That is correct.

"Mr. Ehringhaus: That is correct, sir.

"The defendant bowed his head in affirmation.

"Let the record so show."

Later in the charge, the jury was again admonished that the defendant "comes into court surrounded and clothed with a presumption of innocence which remains around and about him throughout the entire case unless and until the State has satisfied you, the jury, of his guilt beyond a reasonable doubt."

Finally, the court concluded his charge to the jury as follows:

"Take the case and say whether or not you find the defendant guilty of murder in the first degree and, if so, whether or not you desire to recom-

mend life imprisonment, or if you find him guilty of murder in the second degree." Exception.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Moody for the State.

J. C. B. Ehringhaus, Jr., and Clem B. Holding for defendant.

STACY, C. J. The defendant has been convicted of murder in the first degree, without any recommendation from the jury, and sentenced to die as the law commands in such case. He appeals, giving as his principal reason the failure of the court, in his final instruction to the jury, to permit an acquittal in case of a finding that the defendant had committed no crime. For this position, the defendant relies upon the following cases: *S. v. Howell,* 218 N.C. 280, 10 S.E. 2d 815; *S. v. Redman,* 217 N.C. 483, 8 S.E. 2d 623; *S. v. Maxwell,* 215 N.C. 32, 1 S.E. 2d 125; *S. v. Hill,* 141 N.C. 769, 53 S.E. 311; *S. v Dixon,* 75 N.C. 275. He stresses the *Howell and Maxwell cases* as being quite pertinent and directly in point.

Viewing the charge contextually, as required by many decisions, we are constrained to hold that it sufficiently meets the objection which the defendant now makes. *S. v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460; *S. v. Grass,* 223 N.C. 31, 25 S.E. 2d 193; *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *S. v. Ellis,* 203 N.C. 836, 167 S.E. 67.

It is true, a more formal statement of the position would have been in order, but throughout the charge, the jury was admonished that a presumption of innocence surrounded the defendant which remained with him up to the rendition of an adverse verdict against him. Considering the charge as a whole or in its entirety, we think it will do. While it might have been more specific and direct on the point at issue, we are disposed to uphold the trial in the light of the record.

The meaning properly to be ascribed to the responses made by the defendant and his counsel to the court's inquiry during the charge is that there was no element of manslaughter in the case. In this, they were quite correct. There was no intention, however, to change the defendant's plea or to relieve the court of any duty which the law imposed upon him. *S. v. Grier,* 209 N.C. 298, 183 S.E. 272; *S. v. Merrick,* 171 N.C. 788, 88 S.E. 501; *S. v. Foster,* 130 N.C. 666, 41 S.E. 284. The immediate purpose was to eliminate any question of manslaughter. This part of the record may be put to one side as without material significance or bearing on the question here involved.

The question presented perhaps lends itself to much writing, but in the end it all comes to the interpretation to be placed on the entire charge. Construing it as without reversible error, we are disposed to overrule the exceptions and sustain the validity of the trial in the light of the whole record.

No error.

ERVIN, J., dissenting: The prisoner claims the right to a new trial on the ground that essential rules of criminal procedure were set at naught on his trial in the court below.

Candor compels the confession that it is not altogether easy to hearken to the prisoner's plea. The State's testimony tends to show that the prisoner coveted his neighbor's wife, and slew his neighbor with rare atrocity that his physical enjoyment of the wife's person might be exclusive. The very sordidness of the evidence strongly tempts us to say that justice and law are not always synonymous, and to vote for an affirmance of the judgment of death on the theory that justice has triumphed, however much law may have suffered. But the certainty that justice cannot long outlive law gives us pause; and the pause brings again to mind the ancient admonition of our organic law that "a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N. C. Const., Article I, Sec. 29.

The system of criminal justice which prevails in North Carolina is a precious heritance from wise lawmakers of past generations, who observed that tyranny uses the forms of criminal law to destroy those that oppose her will, and who established certain basic rules of criminal procedure to protect the people against such oppression. They bottomed these rules upon the bedrock proposition that the right to trial by jury is the best security of the liberty of men, and they guaranteed such right to all defendants in criminal actions in the Superior Court by the constitutional declaration that "no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court." N. C. Const., Art. I, Sec. 13. It has been held by this Court without variableness or shadow of turning that when a defendant on trial in a criminal case in the Superior Court pleads not guilty to the charge against him, he may not thereafter, without changing his plea, waive his constitutional right to have the jury pass upon his guilt or innocence. *S. v. Muse,* 219 N.C. 226, 13 S.E. 2d 229; *S. v. Ellis,* 210 N C. 170, 185 S.E. 662; *S. v. Hill,* 209 N.C. 53, 182 S.E. 716; *S. v. Crump,* 209 N.C. 52, 182 S.E. 716; *S. v. Camby,* 209 N.C. 50, 182 S.E. 715; *S. v. Walters,* 208 N.C. 391, 180 S.E. 664; *S. v. Straughn,* 197 N.C. 691, 150 S.E. 330; *S. v. Crawford,* 197 N.C. 513, 149 S.E. 729; *S. v. Pulliam,* 184 N.C. 681, 114 S.E. 394; *S. v. Rogers,* 162 N.C. 656, 78 S.E. 293, 46 L.R.A. (N.S.)

38, Ann. Cas. 1914 A, 867; *S. v. Holt,* 90 N.C. 749, 47 Am. Rep., 544; *S. v. Stewart,* 89 N.C. 563.

The founders of our legal system intended that the constitutional right of trial by jury should be a vital force rather than an empty form in the administration of criminal justice. They realized that this could not be if the petit jury should become a mere unthinking echo of the judge's will. To forestall such eventuality, they clearly demarcated the respective functions of the judge and the jury in both civil and criminal trials in a familiar statute, which was enacted in 1796 and which originally bore this caption: "An act to secure the impartiality of trial by jury, and to direct the conduct of judges in charges to the petit jury." Potter's Revisal, Vol. 1, ch. 452. This statute, which now appears as G.S. 1-180, establishes these fundamental propositions: (1) That it is the duty of the judge alone to decide legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case; (2) that it is the task of the jury alone to determine the facts of the case from the evidence adduced; and (3) that "no judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury." This statute is designed to make effectual the right of every litigant "to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury." *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855. Any statement by the judge from which the jury may infer what his opinion is as to the guilt of the accused violates both the letter and the spirit of this statute, and constitutes reversible error. *S. v. Maxwell,* 215 N.C. 32, 1 S.E. 2d 125; *S. v. Sparks,* 184 N.C. 745, 114 S.E. 755.

Those who fashioned the basic concepts of our law entertained an abiding belief that any fair system of criminal justice must insure the acquittal of innocent persons so far as that can be done by human agency. To accomplish this object, they created an unvarying rule that every defendant brought to trial on any criminal charge in any criminal case is to be presumed to be innocent of the crime charged against him. This presumption of innocence attends the accused at every stage of his trial, and shields him from conviction unless it is overcome by evidence satisfying the jury beyond a reasonable doubt of every element of the crime alleged. *S. v. Maxwell, supra; S. v. Carver,* 213 N.C. 150, 195 S.E. 349; *S. v. Ellis,* 210 N C. 166, 185 S.E. 663; *S. v. Shipman,* 202 N.C. 518, 163 S.E. 657; *S. v. Spivey,* 198 N C. 655, 153 S.E. 255; *S. v. McLeod,* 198 N.C. 649, 152 S.E. 895; *S. v. Allen,* 197 N.C. 684, 150 S.E. 337; *S. v. Boswell,* 194 N.C. 260, 139 S.E. 374; *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720; *S. v. Arrowood,* 187 N.C. 715, 122 S.E. 759; *S. v. Singleton,* 183 N.C. 738, 110 S.E. 846; *S. v. Windley,* 178 N.C. 670, 100 S.E.

116. A judge commits prejudicial error if he gives the jury an instruction which deprives an accused of his presumption of innocence. *Gomila v. U. S.,* 146 F. 2d 372; *People v. Gerold,* 265 Ill. 448, 107 N.E. 165, Ann. Cas. 1916 A, 636.

Another basic rule of criminal procedure is embodied in the constitutional assurance that a defendant in a criminal prosecution shall "not be compelled to give evidence against himself." N. C. Const., Art. I, Sec. 11. This clause is the linguistic offspring of the Latin maxim *nemo tenetur seipsum accusare,* meaning that no man can be compelled to criminate himself. 14 Am. Jur., Criminal Law, section 144; 22 C.J.S., Criminal Law, section 649. The events giving rise to this clause and similar constitutional guaranties in other jurisdictions is epitomized in *Brown v. Walker,* 161 U.S. 591, 40 L. Ed. 819, 16 S. Ct. 644. The object of this provision is to secure a person who is or may be charged with crime from making compulsory revelations which could be used against him on his trial for the offense. *S. v. Hollingsworth,* 191 N.C. 595, 132 S.E. 667; *LaFontaine v. Southern Underwriters,* 83 N.C. 133.

The benefit of these procedural principles must be extended to all men with impartiality and inflexibility if the innocent are to be secured against the hazard of unjust conviction, and the State is to have a government of laws rather than one of men. Even the rain falls upon the just and the unjust alike. To be sure, these rules may on occasion delay the conviction of the guilty, or even permit them to go unwhipped of justice altogether. But that is, indeed, not too great a price to pay for so effective an insurance of the acquittal of the innocent.

This brings us to this question: Were these basic principles observed on the trial of the prisoner in the court below? My interpretation of the transcript of the record on appeal compels me to answer this inquiry in the negative.

The record proper discloses that the prisoner was arraigned in the court below with the ancient and awesome formality which obtains in trials for capital felonies in the Superior Court, and that he thereupon entered a plea of not guilty, which was not withdrawn at any subsequent stage of the trial. Furthermore, the case on appeal shows that he did not take the stand as a witness in his own behalf.

At the beginning of the charge, the court told the jury, in substance, that it was authorized to return one of three different verdicts, *i.e.,* guilty of murder in the first degree, guilty of murder in the second degree, or not guilty, depending entirely upon what it found the facts of the case to be from the testimony adduced. This instruction was clearly correct, for there was no evidence in the case justifying a conviction for manslaughter. But it was nullified in three subsequent parts of the charge, which form the bases for Exceptions Nos. 15, 32, and 33.

Exception No. 15 is addressed to this instruction: "I instruct you, however, that you have the right to render under the evidence in this case one of two verdicts. You may find the defendant guilty of murder in the first degree, or you may find him guilty of murder in the second degree." Exception No. 32 challenges a portion of the charge in which the court advised the jury that it would be its duty "to render a verdict of guilty of murder in the second degree" in case it did not find accused guilty of first degree murder. Exception No. 33 covers the last paragraph of the charge, which was in these words: "Take the case and say whether or not you find the defendant guilty of murder in the first degree, and if so, whether or not you desire to recommend life imprisonment, or if you find him guilty of murder in the second degree. Take the case, gentlemen."

Soon after giving the jury the instruction covered by Exception No. 15, the court paused in its charge and propounded this question to the prisoner and his counsel in the presence of the jury: "I do not understand—and if I misunderstand I wish now to be corrected—that the defendant contends, either in his own proper person or through counsel, that this jury should render any less verdict than that of murder in the second degree. Is that correct, gentlemen?" The case on appeal recites that counsel for the prisoner thereupon replied: "That is correct"; and that the prisoner "bowed his head in affirmation."

If the jury had been permitted to rely on its own judgment, it might well have had serious doubt as to the probative value of the affirmation of the somewhat unlettered prisoner that it should "not render any less verdict than that of murder in the second degree" in the absence of any indication that he had any notion as to the constituent elements of the several grades of felonious homicide. But the jury was substantially instructed by the court in later portions of the charge, to which the prisoner has reserved exceptions, that the prisoner admitted "he would be guilty of murder in the second degree upon the evidence which has been adduced by the State," and that the prisoner did not deny "that upon this testimony as introduced by the State the jury would be justified in convicting him of at least murder in the second degree."

It is manifest that substantial procedural rights of the prisoner were nullified at his trial.

The court ought not to have made its inquiry of the accused and his counsel in the presence of the jury. The question itself necessarily implied an assumption on the part of the court that the prisoner was not innocent, but, on the contrary, was guilty of no less a crime than that of murder in the second degree. When the court thus questioned the accused in the presence of the jury, it virtually forced an incriminatory admission from him notwithstanding he had refrained from taking the

stand as a witness and had a constitutional right not to be compelled to give evidence against himself.

The court gave its opinions as to what the testimony proved contrary to G.S. 1-180 in the portions of the charge which the prisoner assigns as error. This is true because the jury unavoidably inferred from these instructions that the court knew that the accused was guilty of no less a crime than second degree murder, and strongly suspected that he was actually guilty of first degree murder. Furthermore, the court charged the jury, in substance, in these same instructions that it had no legal power to acquit the prisoner, but was required by the law itself to convict him of either murder in the first degree or murder in the second degree. In so doing, the court deprived the accused of his presumption of innocence, and denied to him his constitutional right to have the issue of his guilt or innocence determined by the jury.

Neither the compulsory affirmation of the accused nor the statement of his counsel can be construed to be judicial admissions excusing such action on the part of the court. These matters did not withdraw this case from the operation of the fundamental principle that so long as a plea of not guilty stands in a criminal action on trial in the Superior Court, the jury alone is empowered to determine whether the testimony be true or false, and what it proves if it be true. *S. v. Hill,* 141 N.C. 769, 53 S.E. 311; *S. v. Riley,* 113 N.C. 648, 18 S.E. 168; *S. v. Dixon,* 75 N.C. 275. The prisoner could not admit or confess away the presumption that he was innocent, or waive the constitutional necessity for having the issue of his guilt or innocence decided by a jury by anything short of a plea of guilty, and no act, omission, or word of his or his counsel could constitute a plea of guilty to any offense embraced within the indictment unless it was accepted as such by the prosecution. There is no such thing in law as an unaccepted plea of guilty. In consequence, the contention of the State that the prisoner made an unaccepted plea of guilty of murder in the second degree, and that such unaccepted plea of guilty destroyed the presumption that he was innocent and disabled the jury to acquit him is untenable both in law and logic.

The State cites *S. v. Miller,* 197 N.C. 445, 149 S.E. 590, where this language is used in the opinion: "The prisoner, who testified that he was not drinking on the day in question, tendered a plea of murder in the second degree, but this was not accepted by the State. The appeal, therefore, presents the single question as to whether the evidence tending to show premeditation and deliberation is sufficient to warrant a verdict of murder in the first degree. We think it is."

The *Miller case* has no application whatever to the present appeal. An examination of the original record in that action discloses that the trial judge submitted the issue of the guilt or innocence of the accused

to the jury under a charge to which no exception was taken, and that the jury convicted the accused of first degree murder after a trial in which all basic procedural rules were observed. The only question raised by the assignments of error in the *Miller case* was the sufficiency of the State's evidence to support the first degree verdict, and the only decision made therein by this Court was that it was ample for that purpose. Both the original transcript and the opinion disclose the absolute accuracy of this ruling. It is true that counsel for the accused in the *Miller case* announced his willingness to submit his client for second degree murder during a colloquy with the court and the Solicitor occurring in the absence of the jury. This offer was rejected by the Solicitor, and was not communicated to the jury. In truth, it did not figure in the trial in any way whatsoever. The reference to the matter in the quoted portion of the opinion was evidently designed to emphasize that the only question under consideration was the sufficiency of the State's evidence to sustain the first degree verdict.

This cause ought to be tried anew in accordance with sound and time-honored procedural practices. It might well be that such a retrial would result in the same verdict and judgment. That possibility should not shape our action. What may be the ultimate fate of the prisoner in this case is of relatively minor importance in the sum total of things. In any event, his role on life's stage, like ours, soon ends. But what happens to the law in this case is of gravest moment. It must be realized that the consequences of the decision of this Court on this appeal will not be confined to the single prosecution which is denominated on the docket as "State *versus* John Robert Bridges, *alias* Jack Bridges." Such decision will be invoked in other criminal trials as a guiding and binding precedent. The preservation unimpaired of our basic rules of criminal procedure is an end far more desirable than that of hurrying a single sinner to what may be his merited doom. For this reason, I vote for a new trial, and dissent to the ruling which makes my vote ineffectual.

Mr. Justice Seawell has authorized me to state that he concurs in this dissent.

BARNHILL, J., concurring: The dissent filed herein discusses a feature of the case to which no exception was entered and upon which the defendant does not rely in his brief. His counsel excepted for that (1) the court instructed the jury they could return in this case only one of two verdicts: guilty of murder in the first degree or guilty of murder in the second degree; and (2) the court failed to instruct the jury that they could return a verdict of not guilty. These two exceptions are directed to the one assignment of error debated here, to wit, the court erred in that it did not sufficiently charge the jury that it might, and the conditions

under which it should, return a verdict of not guilty. This assignment is fully discussed in the majority opinion. In the conclusion there reached I concur.

But what about the rabbit flushed by the dissent? Did the court unduly prejudice defendant in its instructions and by the colloquy with counsel during the charge? Since the defendant's life is at stake, this attack upon the validity of the trial should not go unanswered.

There was uncontradicted and compelling evidence that defendant slew the deceased. It contains no element of mitigating circumstances, and its credibility was not substantially assailed. Wisdom dictated that counsel, to save the life of their client, undertake to persuade the jury that the circumstances of the killing were not such as to establish premeditation and deliberation beyond a reasonable doubt. The record indicated that they, in conducting the defense and in their arguments to the jury, wisely pursued this course. That this was the theory of the defense was admitted here. So I understood.

The court, to be quite sure that it correctly interpreted the theory of the defense, gave counsel for the defendant full opportunity to challenge its instructions based thereon, to the end that it might correct them if it was in error. Practically at the threshold of the charge the colloquy between court and counsel, quoted in the majority opinion, took place. No exception was entered then and no assignment of error based thereon is presented here.

Thus counsel, in effect, formally admitted, in open court as well as in their arguments, that the homicide was committed by defendant and that the circumstances of the killing were such as to make it murder in the second degree. To this defendant indicated his assent. In my opinion this is the one reasonable interpretation to be placed on the colloquy between court and counsel.

Had counsel so stated at the beginning of the trial, it would have been binding on defendant. That it was made during the progress of the trial does not alter its force and effect. *S. v. Grier,* 209 N.C. 298, 183 S.E. 272. It was a judicial admission made in open court and in the presence of the defendant. It was made at a time and under circumstances which afforded him an opportunity to protest. *S. v. Redman,* 217 N.C. 483, 8 S.E. 2d 623. They were authorized to speak for him. The court acted on the admission. That it did so cannot be held for error. *S. v. Grier, supra.*

It is true the defendant did not go on the witness stand, and the colloquy took place in the presence of the jury. But the court made no direct inquiry of the defendant which put him "on the spot" and compelled, or even invited, an incriminating reply. The court did, however, by its inquiry, afford the defendant full opportunity to affirm or deny the

formal statement of counsel, otherwise binding on him. This was a thoughtful and praiseworthy effort on the part of the trial judge to protect the defendant in all of his rights.

The formal admission had already been made. It did not require defendant's affirmative ratification. His silence would have given assent, but he elected to affirm. How the action of the court in affording him an opportunity to repudiate it could be prejudicial to him I cannot perceive.

In any event, whether counsel referred to the only possible verdicts to be rendered or to the question of manslaughter, the court, notwithstanding the admission, admonished the jury that it should not convict the defendant of any offense unless it was fully satisfied by the evidence that he committed the homicide charged. This feature of the charge is fully discussed in the majority opinion.

I vote to affirm.

WILLIAM HAROLD HENSON AND DOLORES ELAINE HENSON, MINORS, BY THEIR NEXT FRIEND, WILLIAM M. HENSON, v. CECIL THOMAS.

(Filed 30 November, 1949.)

1. Common Law—

So much of the common law as has not been abrogated or repealed by statute is in full force and effect within this State, G.S. 4-1. There is no common law right of action by children against a third party for disrupting the family circle and thereby depriving them of the affection and care of their parents.

2. Courts § 1—

It is the province of the courts to declare the law as it exists and not to create causes of action by engaging in judicial empiricism.

3. Parent and Child § 3c—

Children may not maintain an action against a third person for criminal conversation and alienation of the affections of their mother. There is neither common law nor statutory basis for such action, and the problem is sociological rather than legal.

SEAWELL, J., dissenting.

ERVIN, J., concurs in dissent.

APPEAL by defendant from *Sharp, Special Judge,* September Term, 1949, RANDOLPH. Reversed.

Civil action to recover damages for criminal conversation with and alienation of the affections of plaintiffs' mother, heard on demurrer.

Plaintiffs are the infant children of their next friend and his wife, Estelle Henson. They allege in substance that they and their parents lived happily together in a new home; that defendant, for the purpose of seducing their mother and alienating her affections, paid constant court to her; that as a result of his improper attentions she was induced to leave home on various occasions and go to other cities where she engaged in illicit relations with him; that he thereby alienated the affections of their mother, goaded their father into leaving home, and caused them to lose the companionship, guidance, and care of both their father and mother and brought disgrace upon them to their great hurt and damage. They allege their mother, through the inducement and allurement of defendant, was absent from home from time to time, but they do not allege that she has abandoned them or her home or that she does not still live with them.

The defendant demurred for that the complaint fails to state a cause of action. The demurrer was overruled and defendant appealed.

Ottway Burton for plaintiff appellees.
Miller & Moser for defendant appellant.

BARNHILL, J. May children, acting through their father as next friend, maintain an action against a third party for damages for wrongfully disrupting the family circle and thereby depriving them of the affection, companionship, guidance, and care of their parents? This is the question posed for decision. We are constrained to answer in the negative.

There is no statute in this State creating a cause of action such as the plaintiffs here seek to assert. If it exists, the basis therefor must be found in the common law.

So much of the common law as has not been abrogated or repealed by statute is in full force and effect within this State. G.S. 4-1. But an action such as this was not known to the common law. The mutual advantages, privileges, and responsibilities of members of the family circle were deemed to be social rather than legal. With few exceptions, loss of these benefits, either through an act of a member of the family group or of a third party, could not be recompensed through an action at law.

One spouse could not sue the other, *Scholtens v. Scholtens,* 230 N.C. 149, and a child could not maintain an action in tort against his parent. *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12. The husband could sue a third party for criminal conversation with, and the alienation of the affections of, his wife; but the action was grounded on the common law conception of the husband's property right in the person of his wife.

"The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent." *Small v. Morrison, supra.*

The mutual rights and privileges of home life grow out of the marital status. Affection, guidance, companionship, loving care, and domestic service constitute, in part, the mother's contribution to the happiness and well-being of the family circle. Such obligations on her part are not legal in nature and may not be made the subject of commerce and bartered at the counter. *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414.

Here there is no allegation of abandonment. If the mother is guilty of nonsupport, the statute provides a remedy, Chap. 810, Session Laws 1949, and this remedy is exclusive. *Allen v. Hunnicutt,* 230 N.C. 49.

If the defendant seduced the mother and thereby caused the father to leave home, the cause of action for the resulting damages rests in the father and not the children. If the father abandoned his children, whatever the cause, he is the one who must answer therefor.

The demurrer admits that plaintiffs have been deprived of the companionship, guidance, love, and affection of their mother. This was brought about by the act of the mother in withdrawing these incidents of family life from them. In so doing she has committed no legal wrong for which redress may be had in a court of law.

A child may expect its mother to make these contributions to the home and confidently anticipate that she will ever maintain and preserve her chastity. Yet it may not be said that when she gave it birth, she thereby assumed a legal obligation not only to give it love and affection but also to guard with jealous care the purity and uprightness of character the child so trustfully expects of its mother. These are matters within her keeping. The measure of their contribution is controlled by her willingness and capacity.

Since the mother, who is a free agent, committed no legal wrong for which redress may be had in a court of law, it cannot be said that the defendant, who allegedly induced her to be remiss in her domestic duties, incurred any greater liability than the law attaches to her act.

To hold otherwise would mean that every time a person persuades or induces a mother to engage in other activities to such an extent as to cause her to neglect her children, he commits a tort for which he may be compelled to respond in damages. The only difference lies in the gravity of the wrong and the extent of the damage.

The problem here, in its last analysis, is sociological rather than legal. No one would question the fact that a child has an interest in all the benefits of the family circle. Nor may it be denied that the legislative

branch of the government may give this interest such legal sanction as would make the invasion or destruction thereof a legal wrong. So far, it has not deemed it wise to do so.

It is contended, however, that there is no statutory prohibition against this type of action; that the integrity of the relations and social considerations demand judicial recognition of defendant's liability for enticing plaintiffs' mother from the family home. But the social considerations and the alleged necessity or advisability of protecting the family relation by upholding the action here contended for are arguments more properly addressed to the legislative branch of the government.

"The 'excelsior cry for a better system' in order to keep step with the new conditions and spirit of a more progressive age must be made to the Legislature, rather than to the courts." *Gowin v. Gowin,* 264 S.W. 529; *Garza v. Garza,* 209 S.W. 2d 1012. Our province is to enforce the law as we find it and to determine the existence or nonexistence of such a cause of action by the state of the law as it now exists. In doing so, we are not permitted to find a way out for plaintiffs by engaging in judicial empiricism.

The asserted cause of action was not known to the common law. It has no statutory sanction. It is not for the courts to convert the home into a commercial enterprise in which each member of the group has a right to seek legal redress for the loss of its benefits. It follows, therefore, that the court below erred in overruling the demurrer.

This conclusion is in accord with the decisions in other jurisdictions. *Morrow v. Yannantuono,* 273 N.Y.S. 912; *Rudley v. Tobias,* 190 P. 2d 984; *McMillan v. Taylor,* 160 F. 2d 221; *Taylor v. Keefe,* 56 A. 2d 768; Pound, Individual Interests in the Domestic Relations, 14 Mich. L. R. 177, at p. 185; 2 Cooley, Torts, 4th Ed., 41, sec. 174; Prosser on Torts 936; Vernier, American Family Laws, Vol. IV, p. 480, sec. 267.

There are two cases *contra* which sustain the contention of plaintiffs: *Daily v. Parker,* 152 F. 2d 174, 162 A.L.R. 819, and *Johnson v. Luhman,* 71 N.E. 2d 810. In each of these cases, however, the court concedes that it is creating a cause of action not theretofore known to the law. This is a procedure we are not privileged to follow.

The judgment below is

Reversed.

SEAWELL, J., dissenting: I do not believe any reasonable person will deny that the infant plaintiffs have complained of a definite violation of duty on the part of defendant calculated to inflict upon them injuries of a serious nature. The injury complained of is a natural and probable consequence of the conduct denounced, calculated to subject complainants to shame and disgrace, to make them socially undesirable, and to deprive

them of maternal association, care and instruction; and, following the allegations, causing virtual, or periodical, abandonment on the part of the mother. Few would dispute the fact that plaintiffs' stated cause of action does not satisfy every definition of actionable tort the books afford, and is twin-kin to causes our courts have long entertained without question. Therefore, it seems that in maintaining the position that their grievance is not justiciable, the Court finds itself in a defensive position, —must state satisfactory reasons *why not,*—unless it resorts to legal dogma or fiat, the *"ex cathedra"* finality. The Court has not done the latter. It has given its reasons: Mainly that the cause of action was unknown to the common law, and is not created by any statute. The corollary is that the Court, therefore, cannot act; to do so would "create" a cause of action. There is the further reason advanced that recognition of the injury done the plaintiffs as an actionable tort is inhibited by a policy that forbids the law to intrude upon the peace and harmony of the family.

Addressing my dissent to the first reason assigned for the judicial *non possumus,*—that is, the absence of common law and statutory authority for entertaining the plaintiffs' cause, I may first observe that if there is "no vacuum in the law" there should be none *coram nobis.* If there is no wrong without a remedy, it is a judicial function and duty to find the remedy, not so badly hidden at that, in our courts of general jurisdiction. Until that search proves fruitless we cannot relax on the apologia that it is *"damnum absque injuria,"* or a *"casus omissus"* or whatever other Latin phrase or maxim may be invoked to express, but not explain, the bankruptcy of the law, or the exhaustion of the judiciary. I challenge both assumptions.

We cannot, with any propriety, refer these matters to the Legislature as being the appropriate department to deal with them. This has been done so often that the formula has become a cliché. The Legislature may have sins of its own for which it must do penance, but it is not a scapegoat for the judiciary. The Legislature, with its necessarily casual or occasional dealing with the vast and intricate structure of our legal system, has never attempted to write comprehensively and completely all the rules respecting the rights and remedies to be recognized and observed in the courts. It has not the trained skill, the fitting tools for such a delicate task, the organon necessary to philosophic or scientific approach. For the same reason it has never undertaken to destroy, although it has at times corrected or directed the functional power and duty inherent in the judiciary, on proper occasion, and within its traditional area of free choice to take cognizance of the invasion of natural right; and especially so in those instances where the common law has already built up general rules and categories, from whatever source obtained, in which the inci-

dent situation, however novel, may be classed and included. Our Legislature, fully understanding its limitations, well knowing that it would be impossible for it to create such a system with its multiplicity of relationships and fineness of detail, and fearing that the common law of England in which these things could be found might be lost to us by means of a break in the continuity of government, made the common law our own by the enactment of the statute which is now G.S. 4-1. But whether we inherited the common law by continuity of legal observance and practice, or recaptured it by adoption, we did not thereby acquire a morgue, or a mere dead thing to be administered *cum testamento annexo*, nor did we acquire a mere catalogue of recognized rights and wrongs ending in a *ne plus ultra*. We inherited, or acquired by adoption, the rule by which the common law expanded, and must continue to expand if the result is to be a living law, a fit instrument to govern, to protect rights and prevent injuries analogous to those here inflicted.

While the common law is universally recognized as containing within it a living spirit by which it may be thus expanded, and has been expanded through judicial appropriation or recognition of rules and principles far more than through the imperative *lex scripta*, in the field we are discussing it has long passed the initial stage. Already it has evolved those rules, created the categories, declared the principles within which the case before us may be fittingly framed.

The grievance is one of a social character, of course; so is every other infraction of the duty owed by one member of society to another. The incidence is too deep, however, to be ignored as a thing to be noticed only by "excelsior" minded do-gooders who so constantly and inconveniently disturb the tranquil waters of sociology, or left to the non-curial efforts of society itself to correct the antisocial tendencies and activities of its members; the slow-curing and festering wounds which leave cicatricial marks in the wake of the marauder.

I am not aware of any respectable legal system which divides grievances into two parts: the one sociological, and the other justiciable. Cardozo: The Nature of the Judicial Process, p. 51, *et seq.*

There is no stronger influence felt today in the upbuilding of the law through judicial selection and decision than the social need. It is the one great trend that distinguishes modern law, as influenced by judicial decision, from that of the era immediately preceding. Its humanitarian aspect is proverbial. The judge, standing at the cross-ways of decision in a novel situation, is more apt to search for the social implications and consequences of his choice as a guide to the road he must take. But the democracy of our institutions recognizes society as but the aggregate of the individuals which compose it, finding that the individual right and welfare in matters so intimately connected with life and liberty is not

inconsistent with socially-minded legislation, and that there is no more certain way to serve the best interests of society at large than to visit on the invader of the individual right the full consequences of his violation of a legal duty.

I do not concur in the criticism on "judicial empiricism." It is simply the method of experience by which the judge, acting within the area of his free choice and in the numerous gaps left by legislation arrives at a reasonable decision, and does not refer to the source of the power exercised. It is the gift of the common law and any judge who cites a former decision in support of his opinion,—and we have scattered them on the pages of the reports "Thick as autumnal leaves that strow the brooks In Vallambrosa,"—affirms its propriety and relaxes with a sigh of content. The power of the action has rarely been questioned, and its death has not been adjudicated.

The main opinion brings to the aid of its position the policy, recognized here and elsewhere, that a minor child cannot sue the parent in tort, in a course of reasoning which, it occurs to me, is full of *non-sequiturs.* The rationale of the argument is that since the children cannot sue the mother, it follows that they cannot sue the stranger whose seduction of the mother led to parental neglect, social degradation, and shame.

"Since the mother, who is a free agent, committed no legal wrong for which redress may be had in a court of law, it cannot be said that the defendant, who allegedly induced her to be remiss in her domestic duties, incurred any greater liability than the law attaches to her act."

Thus the opinion transfers the personal immunity from suit of the mother to the defendant, discharging him from liability to the injured infants because she has none, and is unreachable by law. Thus the social equilibrium is balanced and the *pax vobiscum* of the law descends upon it.

To avoid this syllogism the Court will have to do more than refrain from a categorical statement of an unsupportable position. The philosophy remains; and the citations and quotations leave no doubt as to the principles on which decision is based.

I think it is needless to say that the gravamen of the plaintiffs' case does not rest on the grave dereliction of the mother merely. It probes the original unlawful conduct of the defendant which, through her, was causative of the injury. But even if the mother and her seducer were, from a legal point of view, equal partners or joint tort-feasors in the injury inflicted on the children, (which is certainly not the gravamen of the action), two principles apply: First, the children were not required to sue both tort-feasors; and second, the immunity from action enjoyed by the mother is personal, growing out of the parental relation, does not change the character of the act and cannot avail the defendant, or any

other stranger otherwise liable. *Wright v. Wright,* 229 N.C. 503, 50 S.E. 2d 540.

The public policy invoked is supposed to rest on the authority of *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12. "The peace of society and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent."

I do not question this policy as properly applied in *Small v. Morrison,* or the fact that it is in full force; but I do question its application here. I do not believe the Court would be happy in subverting such a policy by a rider written across its face through which the policy, supposedly protecting the home and its inmates in the peace and harmony by refraining from domestic interference by the law, at the same time confers an immunity on a stranger who willfully wrecks the peace and harmony of the home and inflicts upon its inmates injuries which are never healed between the cradle and the grave. It would be a short-sighted policy which would allow strangers to trample with hobnailed boots on ground too sacred for the law to enter with unshod feet.

The two cases referred to in the main opinion—*Dailey v. Parker,* 152 F. 2d 174, 162 A.L.R. 819, and *Johnson v. Luhman,* 71 N.E. 2d 810, are from highly respected courts; and these courts are far from conceding that they are "creating a cause of action" by extending to the cases dealt with the elastic principles of the common law within the area of free judicial choice when new and analogous situations are presented. Both cases go into the marrow of the matter affecting the power and duty of the court in a more thorough way than is permitted me in a dissenting opinion and deserve a reading before the matters with which they deal are treated lightly.

I doubt whether the Court can with propriety go to the extent of regarding the instant case as an attempt to commercialize family relations. It is not, as in *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414, a bargain or contract to be made between husband and wife in which the latter agreed to support the children; and if the Court should seat its decision on moral instead of technical grounds we shall have sustained a moral defeat.

There is nothing revolutionary in recognizing the cause of these infant plaintiffs as actionable, and much that is sanitary and just. In the "cold light" of logical analysis they cannot, without arbitrary discrimination be excluded from the category within which we give, at every sitting, relief to others, the victims of tortious injury, whose causes of action are certainly no more meritorious.

The plaintiffs have, no doubt, put into their pleading some things for which they cannot obtain legal redress. But if the complaint contains anything whatever for which the court may grant relief it should survive a general demurrer. The liberality which the Code Practice necessarily extends to pleadings requires the Court to be diligent in observing their virtues rather than astute in detecting their vices.

The judgment overruling the demurrer should be sustained. Pound: Spirit of the Common Law, 170, 173; 184, 185; *Holmes* in *So. Pacific Co. v. Jenson,* 244 U.S. 205, 251; Cardozo: The Nature of the Judicial Process, pp. 69, 70; *Oppenheim v. Kridel,* 236 N.Y. 156; *Daily v. Parker, supra; Johnson v. Luhman, supra.*

I am authorized to state that *Mr. Justice Ervin* concurs in this dissent.

MARY G. BRUCE, ADMINISTRATRIX OF THE ESTATE OF WALTER B. BRUCE, DECEASED, v. O'NEAL FLYING SERVICE, INC.

(Filed 30 November, 1949.)

1. Aviation § 6: Principal and Agent § 13d—

Testimony disclosing that the president of defendant aviation corporation selected a pilot to fly in defendant's air show and gave the pilot complete charge of the plane which he was to use in the demonstration, *is held* sufficient to raise an inference that the pilot was the agent of the corporation in flying the plane in the air show.

2. Same—

Evidence that intestate asked defendant's pilot if he would like to have a passenger while performing a maneuver the pilot was employed to perform, and that the pilot invited intestate to "come on," and that defendant's president was present, heard the conversation, and made no objection, *is held* sufficient to raise the inference that the pilot was authorized to take intestate up with him.

3. Aviation § 7—

The duty owed to a gratuitous passenger in a plane is to exercise ordinary care for his safety.

4. Same—Evidence held sufficient to be submitted to jury on question of negligence of pilot resulting in injury to passenger.

The evidence tended to show that intestate was a gratuitous passenger in a plane in the execution of a maneuver in defendant's air show, that the particular maneuver was a "precision spin," that the pilot was instructed to begin the spin at 2,000 feet and make some three to five turns as appeared to the individual pilot to be safe and as necessity required, that he began the maneuver at 1,800 feet, made five and a half turns and apparently made no effort to pull out before the plane struck the ground.

There was expert testimony that the maneuver was safe when properly executed, that the pilot should have pulled out of the spin when at least 500 feet from the ground, and that from a height of 1,800 feet only two or three turns could be made with safety. There was testimony that the plane had dual controls, but that the pilot was in charge of the plane and was in the instructor's seat. *Held:* That the pilot was in control of the plane at the time and that he was negligent in executing the maneuver are permissible inferences from the evidence, and the granting of defendant's motion to nonsuit was error.

5. Same—

A person who is a voluntary passenger in a plane in the execution of a particular maneuver in an air demonstration cannot be held contributorily negligent as a matter of law in assuming the risk when there is expert testimony that such maneuver is normal and safe in the hands of a careful pilot, since the danger is not so obvious or eminent as to require an ordinarily prudent man to refrain therefrom.

6. Negligence §§ 17, 19c—

Assumption of risk and contributory negligence are affirmative defenses upon which defendant has the burden of proof, and in order for defendant to be entitled to nonsuit thereon they must be so plainly established by plaintiff's evidence that a reasonable man could draw no other inference.

7. Appeal and Error § 40i—

In passing upon an exception to the entering of a judgment of nonsuit, the Supreme Court cannot weigh the evidence but may determine only if it is legally sufficient in its inferences to be submitted to the jury.

BARNHILL, J., dissenting.

PLAINTIFF's appeal from *Stevens, J.*, June Civil Term, 1949, WAKE Superior Court.

Action for wrongful injury and death of plaintiff's intestate. Nonsuit on demurrer to the evidence.

Pertinent evidence of the plaintiff may be summarized as follows:

W. S. O'Neal, at that time president of the defendant corporation and manager of its local airport where the alleged injury was inflicted and death occurred, staged in behalf of the defendant an air show to dedicate its new airport and demonstrate airplane maneuvers, to which the public was invited, and around 8,000 persons attended.

O'Neal was president of the defendant corporation and manager of its airport and in charge of the show, himself participating in the maneuvers. The flying staff consisted of O'Neal, H. L. Bobbitt and Mack Bass.

The operation being conducted was the demonstration of "precision spins" which O'Neal testified was a normal movement performed in an airplane and, when properly done, was safe and not dangerous. It is

described as a controlled movement in which the pilot causes the plane to descend in an oscillating, spiral movement from which the pilot, never losing control, may "level off" or recover when he desired.

Before the flight began it was planned and agreed that the pilots above mentioned were to ascend to 2,000 feet and upon reaching that height to drop into the spiral movement, making from three to five turns, as appeared to the individual pilot to be safe, and as necessity required.

Just before the ascent plaintiff's intestate, who had sometimes given instruction in flying at the airport, but who was not then in the defendant's employment, approached the pilot Bobbitt, saying, "Bobbitt, how would you like to have a passenger?" And Bobbitt invited him to "come on." This was in the presence of Manager O'Neal (who so testified). He further testified that it was a matter "up to the pilot." Bruce entered the plane, taking the rear seat, and the planes took off as planned in a V formation, Bobbitt leading in the front plane at the apex of the V. When Bobbitt's plane reached an altitude of 1,800 feet, instead of the 2,000 feet as planned, he started in his spin, or spiral movement, made five and one-half turns, apparently made no effort to recover and the plane struck the ground. Both Bruce and Bobbitt were instantly killed.

Witness O'Neal, qualifying as an expert, testified that Bobbitt should have completely recovered to normal straight flight at least 500 feet from the ground and that it was unsafe to continue the spiral movement any closer. O'Neal, on seeing the airplane strike, throttled his engine hard and, grading his turns, went down and landed. O'Neal gave his expert opinion that the crash was due to the fact that the pilot Bobbitt, in demonstrating the spin, "overdid it—tried to make it too good" and went too low; that if he had finished in three spins he would still have been 1,000 or 1,200 feet above ground; starting to spin at 1,800 feet he could not make more than three turns safely. The pilot Bobbitt could tell by his altimeter the height of the plane. Bobbitt was 50 or 100 feet from the ground when he went into the fourth or fifth spin. Witness further stated that he was flying for the O'Neal Flying Service.

On the cross-examination this witness stated that he did not know what went on in the cockpit of the plane, could not see and could only assume. He described the plane as an Aeronca Tandem Model, 7AC, demonstrating with a model the maneuver of spinning and declaring it to be a safe maneuver when properly executed. He stated that Mr. Bobbitt was in the instructor's seat, the front seat, and Mr. Bruce was a passenger sitting in the rear seat. The plane had dual controls—two pairs of controls—so that either person had a means of controlling its flight. The controls, however, were coupled together so that a movement of one device caused a corresponding simultaneous movement in the similar member of the other—the control sticks and pedals executing exactly the same movement.

On re-direct examination the witness stated Mr. Bobbitt was in the front seat and doing the piloting.

R. H. Edwards, who qualified as an expert, stated that he was chief pilot of Serv-Air, Inc., which operates an airport near Raleigh and was present and witnessed the fatal flight. He testified that the spiral maneuver referred to was safe when properly performed and that an Aeronca plane was suitable to use in that maneuver; that if the movement was executed from an altitude of 1,800 feet the observed number of turns could not be made with safety. From that altitude, he testified, only two or three turns could have been made with safety. He testified on cross-examination that either of the persons in the plane could have controlled its movements—but if the pilot in front had set his stick and was pushing on the pedals controlling the spin, the man in the rear seat would have to overcome his force.

B. W. Stevens, a news photographer, also a pilot, testified that he saw the three planes reach their altitude and start spinning in successive order. The lead plane was practically on the ground when the third plane began spinning. It had made five and one-half turns when it hit the ground. Photographs taken by this witness were used in illustration. The witness described the motion of the plane in making the spiral as a leaf falling of its own weight.

Other evidence was introduced on the issue of damages and matters not concerned with the subject of this decision.

At the conclusion of plaintiff's evidence, the defendant, offering none, demurred and moved for judgment of nonsuit. The motion was allowed, and plaintiff excepted and appealed.

Simms & Simms and Douglass & McMillan for plaintiff, appellant.

Murray Allen for defendant, appellee.

SEAWELL, J. In this action for negligent injury resulting in death of plaintiff's intestate, nonsuit was allowed on demurrer to the plaintiff's evidence, and the defendant was, therefore, not under the necessity of offering any. Decision requires consideration only of the nonsuit, which gave plaintiff's case the *coup de grace.* The trial judge gave no intimation as to the basis of his ruling, and it is, therefore, referable to any reason which may justify it. The defendant-appellee suggests several, any one of which, it is contended, will support the judgment: That the evidence contains no inference of negligence on the part of the pilot in charge; that the pilot, Bobbitt, was not at the time, and for the purpose undertaken, an employee or agent of the defendant, so as to make the latter liable on the principle *respondeat superior;* that the plaintiff is barred from recovery by his assumption of the risk in participating in an

obviously dangerous maneuver; that he was contributorily negligent; and that he invited or willingly suffered the injury resulting in death, (*"volenti non fit injuria"*).

We consider these questions, perhaps not in order, but as they are touched by the evidence.

The evidence tends to show that Bobbitt was an employee of the defendant and as such was given complete charge of the plane which operated in the air show, or demonstration. O'Neal, the president of the defendant company and the manager of this enterprise, testified that Bobbitt was selected by the defendant for this purpose. This is sufficient to raise an inference of agency. Mecham on Agency, (2d Ed.), sec. 1859; *Irwin v. Judge,* 81 Conn. 412; *Hill v. Morey,* 26 Vt. 178; 57 C.J.S., Master & Servant, sec. 563.

The circumstances under which Bruce entered the plane also raise the inference that the pilot was authorized to take him up and owed to him the duty, imputed to the defendant, to refrain from negligent injury. The invitation was extended to Bruce by Bobbitt within the hearing of O'Neal and its significance was at once apparent. It did not require the spoken word, merely his silent acquiescence to give authority. *Wright v. Wright,* 229 N.C. 503, 506, 50 S.E. 2d 540; *Russell v. Cutshall,* 223 N.C. 353, 26 S.E. 2d 866; *Hayes v. Creamery,* 195 N.C. 113, 141 S.E. 340; *Fry v. Utilities Co.,* 183 N.C. 281, 111 S.E. 354; Schwartz, Trial of Automobile Cases, sec. 373.

The measure of defendant's duty is that of ordinary care. *Wright v. Wright, supra.* The above citations are concerned with automobile law but Agency, the measure of negligence, and other principles discussed are equally applicable to the law of aviation. *Wilson v. Colonial Air Transport, Inc.,* 278 Mass. 420, 425, 23 N.C.C.A. (N.S.) 384; *Bird v. Louer,* 272 Ill. App. 522; *Rogina v. Midwest Flying Service,* 325 Ill. App. 588, 60 N.E. 2d 633; *Interstate Airlines v. Arnold,* 127 Neb. 665, 256 N.W. 513; *Apartan Aircraft Co. v. Jamison,* 181 Okl. 645, 85 P. 2d 1096; 2 C.J.S., Aerial Navigation, sec. 19, p. 907.

The legal sufficiency of the evidence to go to the jury is more strongly challenged in two respects: It is contended that the testimony of expert witnesses concerning the crash of the plane and its cause is merely guesswork, without probative force, and does not rise to the dignity of evidence; and that, at any rate, there is no evidence to determine which of the occupants of the plane—whether the pilot put in official charge, or Bruce, who entered as a passenger—had control at the time of the spinning maneuver which resulted in the crash and death of Bruce.

While the cross-examination elicited answers from the witnesses giving expert opinions as to the operational failure led to answers which appellee construes as withdrawing their statements, it may be conceded there were

some assumptions, that part of this evidence was directed to the circumstance that they could not, and did not, see what took place inside the cockpit, and had made some assumptions as to who was in charge. We cannot find that in any place they withdrew their statements as to the fault in conducting the maneuver, regardless of whether Bobbitt or Bruce was at the controls.

O'Neal, the president of the flying service and manager of the demonstration, after testifying to the agreement which was made between the three pilots, himself, Bobbitt and Bass, made for reasons of safety, testified that flying in V formation he watched every movement of Bobbitt's plane from its top altitude down to the ground, and counted the turns; and testified in this respect as follows: "At a height of 1,800 feet Mr. Bobbitt, being No. 1, he started on his spin. I noticed him when he started to spin, and he spun and spun, and it appeared to me that he went into a tight spiral, that is a maneuver that you wouldn't know from a spin, hardly, in seeing it from the ground; you would think it was the same thing. It appeared to me that he went into a tight spiral, and he made five and a half turns—I counted them—then he struck the ground . . . straight in, nose down . . . still curving," . . . and apparently "made no effort whatever to recover." For the sake of safety "he should have completely recovered and gone into a normal, straight flight at least 500 feet above the ground."

In stating that he had 15 years' experience in operating airplanes and observing their operation, he testified, "My opinion was that the pilot demonstrating the spin just overdid it a little bit too much . . . apparently he tried to make it too good. He just went too low." He further testified that from the elevation at which Bobbitt began the spin only about three turns could have been made with safety and that the pilot was not more than 50 or 100 feet from the ground when he went into the fourth or fifth spin.

Smith v. Whitley, 223 N.C. 534, 27 S.E. 2d 442, has no application whatever to the facts of this case. In that case neither the pilot nor the passenger was killed, and both testified. The plaintiff Smith testified "that the plane went into a spin and crashed and I don't know why." The pilot Nelson testified, "I don't know just why the plane crashed. It just came down in a spin with the nose to the ground."

It will be seen from this short *per curiam* opinion that the plaintiff really based his case on the fact that the pilot was unlicensed and, of course, failed to show this as a proximate cause of the injury.

In the instant case the spin was not accidental; it was a planned maneuver and there is evidence to be submitted to the jury as to the negligence of the operation which caused the crash.

That question, that is, whether Bobbitt was at the controls and responsible for the movements of the plane, is not without supporting evidence. Permissible inference that Bobbitt was at the controls at the time may be made from the attending circumstances although no eye saw what took place in the cockpit. Bobbitt was put in official charge of the plane and its operation, in the forward seat of the cockpit. Bruce entered as a passenger. It is hardly conceivable that their relative positions as passenger and pilot changed during the maneuver since Bobbitt was selected for that purpose and the responsibility placed upon him. There is a strong inference that he continued the operation of the plane during maneuvers. It is in evidence that to cause the oscillating or circular movement of the plane the pilot would have to pull the stick back to the seat, or almost to the seat, and push with extended leg, either the right pedal or the left pedal, according as a right turn or a left turn was desired; and that in this position the person in the rear seat, if minded to take control, could not wrest control from the man in front, except with difficulty, and one witness stated, perhaps not at all.

The rule requires us to consider the evidence and all its inferences in the most favorable light for the plaintiff. Mere imaginative or speculative possibility as to what may have occurred is not sufficient to overcome the inferences raised by this evidence, or the permissible inference that Bobbitt was in control.

Under the evidence the plea of assumption of risk is not tenable. We cannot assume, against the evidence before us, that the enterprise on which Bruce accompanied the pilot Bobbitt, even if known to him in advance, (and of this there is no evidence), involved such an obvious or imminent danger to life and limb as to require an ordinarily prudent man to refrain from participating in it. In so far as the flight itself is concerned, it is recognized as a convenient mode of travel, regularly and extensively used, and reasonably safe. The evidence, without any witness stating *contra,* tends to show that the plane in which the demonstration took place was fit and suitable for the purpose; and that the maneuver itself was normal and safe in the hands of a careful pilot.

The contention that plaintiff is barred from recovery because his intestate negligently contributed to his own death cannot be maintained here as a matter of law on the present state of the evidence. If addressed to the suggestion that Bruce may have been in control of the plane at the time of his injury, there is no evidence of that fact. If advanced on the theory that he voluntarily participated in the maneuver, as suggested, being executed at the time of his injury and death, as we have already stated in dealing with the question of assumption of risk, the evidence tends to show that the operation under way at the time was not of a

character which would attribute negligence to a reasonably prudent man in engaging in it.

The pleas of assumption of risk and contributory negligence are both affirmative and require a showing on the part of the defendant to be considered at all; and to prevail as a matter of law, as to either, it must plainly appear from the evidence that a reasonable mind could draw no other inference.

As we have stated, assumption of risk and contributory negligence are affirmative pleas and ordinarily must be left to the jury. We find no evidence in support of either plea that would justify the court in taking it from the jury.

Our task as an Appellate Court is merely to judge of the probative value of the evidence and not its weight; to say whether there is a legal sufficiency in its inferences to be submitted to the jury. Applying these principles of law, we conclude that there was error in withdrawing the evidence from the jury, and the order of nonsuit is, therefore,

Reversed.

BARNHILL, J., dissenting: The majority conclude that the record discloses sufficient evidence of negligence to require the submission of appropriate issues to a jury. The conclusion is: There is evidence the pilot did not pull out of the spin in time to prevent a crash, and this is evidence of negligence. To this conclusion I must register my dissent.

The essential facts are substantially stated in the majority opinion. The only testimony offered for the purpose of establishing the alleged negligence was the testimony of two expert pilots.

W. S. O'Neal testified that Bobbitt could have made three spins in safety but that in his opinion he—Bobbitt—"just overdid it a little bit too much . . . apparently he tried to make it too good. He just went too low." He later testified that it is impossible to give an explanation of what happened. "Nobody knows what happened there . . . I couldn't see anything but the plane . . . I did not know what was going on in that plane . . . I just assumed what they did."

R. H. Edwards testified that Bobbitt could have made three spins in safety; that in his opinion the crash was caused by the pilot doing too many spins before he recovered. "When the plane started spinning it continued to spin right on into the ground." He testified further on cross-examination that all he was saying about it is a surmise or an assumption on his part from seeing the plane start to spin and spinning down and hitting the ground; that he was a mile away.

The substance of this testimony is this: the plane went into a spin maneuver and the pilot failed to peel off and pull out of the spin in time to prevent a crash. Otherwise it is nothing more than conclusion testi-

mony frankly based on surmise and not on fact, if, indeed, the witnesses said or intended to say more than that.

Whether the pilot's failure to peel off was due to atmospheric conditions or to some failure of the plane or to the voluntary act of the pilot does not appear. The spin was begun before the plane reached the agreed altitude. Perhaps the pilot could not avoid it. In any event he did not peel off and pull out of the spin in time to prevent a crash. It takes no expert or seer to reach this conclusion. The fact is self-evident. But this is not sufficient. It is common knowledge "that airplanes do fall without fault of the pilot," and evidence the plane went into a spin and crashed is not sufficient to repel a motion to nonsuit. *Smith v. Whitley,* 223 N.C. 534, 27 S.E. 2d 442; Anno. 99 A.L.R. 192; *S. v. Vick,* 213 N.C. 235, 195 S.E. 779.

Was the failure to pull out of the spin and the resulting crash proximately caused by the negligence of the defendant? This is the determinative question which this record fails to answer.

True the plane did not peel off in time to prevent a crash, but why? Was it due to error of judgment or carelessness on the part of the pilot? Did the control stick jam, or the engine stall, or the aileron cable break, or the rudder bar fail to respond, or did the pilot-passenger interfere with the controls? These and like questions are unanswered except by mere conjecture. The expert witnesses surmise but frankly admit they do not know.

It is not sufficient for plaintiff to show that there must have been some negligence, somehow, somewhere. This may be said of almost every automobile collision. He is required to prove more than the possibility or probability of negligence. He must establish want of due care in some particular. In my opinion, therefore, the plaintiff has failed to make out a case sufficient to repel the motion to dismiss as in case of nonsuit.

It is difficult, if not impossible, to distinguish this case from *Smith v. Whitley, supra.* There, "the plane went into a spin and crashed and I do not know why." "I don't know just why the plane crashed; it just came down in a spin with the nose to the ground." Surely there, as here, the pilot failed to peel off in time to prevent a crash, or else there would have been no crash.

In that case we affirmed the judgment of nonsuit. The court below relied on that decision in granting nonsuit here, but we reverse. If we intend to overrule that decision we should say so, to the end that Bench and Bar may know which case they should follow in the future.

If the fact the plane went into a spin and the pilot, for some unexplained reason, failed to peel off in time to prevent a crash permits an inference of negligence, the judgment should be reversed. Otherwise not.

It seems to me we settled the question in the *Smith case,* to which I think we should adhere. I therefore vote to affirm.

NOTE: The majority opinion now cites and undertakes to distinguish the *Smith case*—the pilot and passenger were killed here, they survived there. Even so, I have fully expressed my views and am content to rely on the facts as disclosed by the two records.

WINBORNE, J., concurs in dissent.

PETER CANESTRINO v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY; FRED W. STAUDT, TRADING AND DOING BUSINESS AS STAUDT'S BAKERY; AND SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 30 November, 1949.)

1. Contracts § 19: Corporations § 40—

Where a corporation, in purchasing the assets of an old corporation from the receivers, agrees to assume the liabilities of the receivers in connection with the operation of the business, such agreement constitutes a contract for the benefit of creditors and claimants, and they may sue thereon as third party beneficiaries even though strangers to the contract and to the consideration.

2. Judgments §§ 29, 30: Torts § 6—Adjudication that plaintiff had failed to state cause against one defendant as joint tort-feasor does not preclude other defendant from asserting cross-action for contribution.

Plaintiff sued the receivers of a corporation and an individual as joint tort-feasors. The demurrer of the receivers on the ground that the complaint did not allege a cause of action against them was sustained, and plaintiff did not amend or appeal. Thereafter, the individual defendant filed a cross-action for contribution against the receivers, alleging facts sufficient for their joinder under G.S. 1-240. *Held:* The judgment sustaining the demurrer adjudicated only that the complaint was insufficient to state a cause of action against the receivers as joint tort-feasors, and does not estop the individual defendant from setting up the cross-action against them as joint tort-feasors, since the individual defendant was not the "party aggrieved" by the determination of that issue of law between the plaintiff and the receivers, and had no right to appeal therefrom, G.S. 1-271, and no power to force plaintiff to amend or appeal.

3. Pleadings § 15—

A demurrer tests the legal sufficiency of the pleading demurred to, admitting for the purpose the truth of all matters and things alleged therein.

4. Contracts § 19: Corporations § 40: Torts § 6—Cross-action held sufficient to allege cause in favor of pleader as third party beneficiary.

Plaintiff instituted action against an individual defendant and receivers of a corporation as joint tort-feasors. The receivers' demurrer on the ground that the complaint failed to state a cause of action against them was sustained and plaintiff did not amend or appeal. The individual defendant then filed a cross-action against the receivers for contribution, G.S. 1-240. Thereafter the individual defendant had a corporation joined as a defendant upon allegations that the corporation, in purchasing the assets from the receivers, assumed all liabilities of the receivers in connection with their operation of the business. *Held:* The cross-action states a cause of action against the corporation in behalf of the individual defendant as a third party beneficiary under the contract, and the corporation's demurrer to the cross-action was properly overruled. Whether the individual defendant was entitled to the joinder of the corporation as a party defendant in the action as constituted is not presented or decided.

APPEAL by defendant, Seaboard Air Line Railroad Company, from *Stevens, J.*, at the June Term, 1949, of WAKE.

For convenience of narration, L. R. Powell, Jr., and Henry W. Anderson, the Receivers of the Seaboard Air Line Railway Company, are called the Receivers; Fred W. Staudt, trading and doing business as Staudt's Bakery, is designated as Staudt; and the Seaboard Air Line Railroad Company, which is not to be confused with the Seaboard Air Line Railway Company, is characterized as the Railroad Company. We shall endeavor to promote ease and clarity of understanding by omitting all reference to dates and the other multitudinous parts of the record not directly germane to the precise question raised by the appeal.

Stripped of all nonessentials, the pertinent matters are set forth below.

The plaintiff sued the original defendants, to wit, the Receivers and Staudt, who were duly served with process, upon a complaint alleging, in substance, that the plaintiff was a passenger on a train, which was being operated by the Receivers in a southerly direction through Wake Forest, North Carolina; that the train was derailed at a public grade crossing in Wake Forest as the outcome of a collision between it and a motor truck, which belonged to Staudt and which was being driven on a mission for Staudt by his regularly employed driver; that the plaintiff suffered substantial personal injuries in the collision and derailment; and that the collision, the ensuing derailment, and the consequent personal injuries of the plaintiff proximately resulted from the combined negligence of the Receivers and Staudt's driver in certain specified particulars.

No occasion arises on the present record for itemizing the specific allegations of negligence made by plaintiff. It will suffice to note that the complaint reflected a purpose on the part of plaintiff to hold the Receivers and Staudt liable to him as joint tort-feasors.

The Receivers demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against them. They specifically asserted in their demurrer that upon all the facts alleged by the plaintiff in his complaint, it appeared that the negligence charged against Staudt's driver was in law the sole proximate cause of plaintiff's injury.

The hearing upon the demurrer was had before his Honor, Henry A. Grady, Emergency Judge, who entered an order sustaining the demurrer on the ground that the plaintiff could not recover against the Receivers "upon the allegations of the complaint" and allowing the plaintiff thirty days in which to amend his complaint. Neither the plaintiff nor Staudt appealed to the Supreme Court from the judgment upon the demurrer, and the plaintiff did not amend his complaint. In consequence, the action was dismissed as to the Receivers upon the expiration of the time allowed the plaintiff for amending.

After these events, Staudt filed an answer, denying actionable negligence on his part, and alleging a cross-action against the Receivers in which he asked that the Receivers be brought in again as defendants and that he be awarded judgment over against them for contribution on the theory that they were joint tort-feasors with him in causing injury to the plaintiff in the event the plaintiff should recover judgment against him for the injury mentioned in the original complaint. Staudt expressly averred that he was entitled to have the Receivers brought in as additional defendants by reason of the matters set out in his answer and cross-action notwithstanding that they had theretofore been dismissed from the action "upon a demurrer to the complaint filed herein by the plaintiff." No necessity exists for detailing the precise allegations of the answer and the cross-action against the Receivers. It is sufficient for the nonce that they state facts sufficient in law to constitute a valid claim on the part of Staudt for contribution from the Receivers under the provisions of G.S. 1-240 in case of a recovery by the plaintiff against Staudt for the injury involved in the action.

Subsequently the court permitted Staudt to amend his answer so as to set up a cross-action against the Railroad Company based on a transaction alleged to have occurred during the pendency of the action. Such cross-action is predicated on the matters asserted in the original answer and the cross-action against the Receivers, and an additional averment reading as follows:

"11. Upon information and belief that on or about August 1, 1946, Seaboard Air Line Railroad Company entered into an agreement with L. R. Powell, Jr. and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, by the terms of which agreement Seaboard Air Line Railroad Company took over the operation of the railroad thereto-

fore operated by said Receivers and assumed the assets and liabilities of said Receivers in connection with the operation of said railroad; that among liabilities for which Seaboard Air Line Railroad Company assumed responsibility was the liability of said Receivers to the plaintiff in this action by reason of the matters alleged in plaintiff's complaint and their liability to defendant, Fred W. Staudt, by reason of the matters alleged in this Further Answer and Defense; that if Fred W. Staudt was guilty of any act of negligence as alleged in the complaint, which is again hereby expressly denied, the negligence of the railroad employees as hereinabove alleged proximately caused and contributed to any injury which plaintiff may have sustained, said negligence operating and concurring in producing said injury; and if this defendant was negligent and is also responsible to the plaintiff, which is again hereby expressly denied, then and in that event Seaboard Air Line Railroad Company under its aforesaid agreement with L. R. Powell, Jr. and Henry W. Anderson, Receivers, is jointly and concurrently liable with this defendant, and this defendant has a right to have said liability and responsibility of Seaboard Air Line Railroad Company determined in this action under and by virtue of the terms and provisions of G.S. 1-240."

For want of a more descriptive term, the allegations of Staudt's answer asserting the cross-action against the Railroad Company are hereinafter called a cross-complaint. The avowed purpose of such cross-complaint is to enforce against the Railroad Company its alleged promise to the Receivers to discharge their contingent liability for contribution to Staudt in the event Staudt is held liable to plaintiff in this action.

Upon the basis of Staudt's pleading, the court entered orders making the Receivers and the Railroad Company additional defendants and directing that they be served with process in the action. Service was obtained upon the Railroad Company only, and it appeared and filed this demurrer:

"The defendant, Seaboard Air Line Railroad Company, demurs to the answer of defendant, Fred W. Staudt, in so far as the allegations thereof relate to this defendant upon the ground that the said answer does not state facts sufficient to constitute a cause of action against this defendant, for that it appears therefrom that there was no liability on the part of L. R. Powell, Jr. and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, to the plaintiff in this action or to the defendant, Fred W. Staudt, on or about August 1, 1946, the date alleged as the time when Seaboard Air Line Railroad Company entered into the alleged agreement with L. R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, referred to in Section 11 of the answer of Fred W. Staudt. Wherefore, the defendant, Seaboard Air Line Railroad Company, moves that this action be dismissed as to it."

The hearing upon this demurrer was before his Honor, Henry L. Stevens, Jr., at the May Term, 1949, of the Superior Court of Wake County. Judge Stevens entered a judgment overruling the demurrer and allowing the Railroad Company to replead to the cross-complaint against it. The Railroad Company excepted and appealed, assigning the overruling of its demurrer to the answer as error.

A. J. Fletcher, F. T. Dupree, Jr., and Douglass & McMillan for the defendant, Fred W. Staudt, doing business and trading as Staudt's Bakery, appellee.

Murray Allen for the defendant, Seaboard Air Line Railroad Company, appellant.

ERVIN, J. This appeal presents this problem for solution: Does the cross-complaint of Staudt against the Railroad Company state facts sufficient to constitute a cause of action? Since the sufficiency of the cross-complaint in this respect is challenged by the demurrer of the Railroad Company, it must appear, either expressly or by implication, that the facts necessary to entitle Staudt to the relief sought by him are set forth therein.

The Railroad Company was not an actor in the events resulting in the injury to the plaintiff, and cannot be held liable to Staudt for contribution as a fellow joint tort-feasor under G.S. 1-240 in case Staudt is adjudged liable to the plaintiff for such injury in this action. Staudt's cross-complaint is bottomed upon another theory.

It first states sufficient facts to establish the liability of the Receivers to him for contribution as fellow joint tort-feasors under G.S. 1-240 in case judgment is rendered against him on the plaintiff's complaint. *Charlotte v. Cole,* 223 N.C. 106, 25 S.E. 2d 407; *Lackey v. R. R.,* 219 N.C. 195, 13 S.E. 2d 234; *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434. It then alleges, in substance, that during the pendency of this action the Railroad Company took over the operation of the railroad theretofore operated by the Receivers under a contract between it and the Receivers whereby it purchased the property of the railroad and as a consideration therefor agreed to discharge the liabilities incurred by the Receivers in connection with their operation of the railroad, including their contingent liability for contribution to Staudt arising upon the matters set out in the cross-complaint. The avowed object of Staudt's cross-action is to enforce the promise which the Railroad Company made to the Receivers in its contract with them to discharge their liability for contribution to Staudt in the event the plaintiff recovers judgment against Staudt for the injury described in the complaint.

Staudt is a stranger to both the contract between the Receivers and the Railroad Company, and the considerations supporting it. Nevertheless, he will profit by the performance of the contractual obligation of the Railroad Company to discharge the statutory liability of the Receivers for contribution to him in case the plaintiff obtains judgment against him. It appears, therefore, that the promise of the Railroad Company to the Receivers constitutes a contract for the benefit of Staudt, even though it may have been exacted of the Railroad Company by the Receivers to relieve themselves of their statutory liability. In truth, Staudt occupies the status of a creditor beneficiary under the contract. Williston on Contracts (Rev. Ed.), section 361.

The rule is well established in this jurisdiction that a third person may sue to enforce a binding contract or promise made for his benefit even though he is a stranger both to the contract and to the consideration. *Chipley v. Morrell,* 228 N.C. 240, 45 S.E. 2d 129; *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383; *James v. Dry Cleaning Co.,* 208 N.C. 412, 181 S.E. 341; *Foundry Co. v. Construction Company,* 198 N.C. 177, 151 S.E. 93; *Keller v. Parrish,* 196 N.C. 733, 147 S.E. 9; *Glass Co. v. Fidelity Co.,* 193 N.C. 769, 138 S.E. 143; *Schofield v. Bacon,* 191 N.C. 253, 131 S.E. 659; *Parlier v. Miller,* 186 N.C. 501, 119 S.E. 898; *Rector v. Lyda,* 180 N.C. 577, 105 S.E. 170, 21 A.L.R. 411; *Crumpler v. Hines,* 174 N.C. 283, 93 S.E. 780; *Chandler v. Jones,* 173 N.C. 427, 92 S.E. 145; *Springs v. Cole,* 171 N.C. 418, 88 S.E. 721; *Supply Co. v. Lumber Co.,* 160 N.C. 428, 76 S.E. 273, 42 L.R.A. (N.S.) 707; *Faust v. Faust,* 144 N.C. 383, 57 S.E. 22; *Gorrell v. Water Supply Co.,* 124 N.C. 328, 32 S.E. 720, 46 L.R.A. 513, 70 Am. St. Rep. 598; *Porter v. R. R.,* 97 N.C. 46, 2 S.E. 374. Hence, the allegations of the cross-complaint relating to the contingent liability of the Receivers for contribution to Staudt and the contractual assumption of such liability by the Railroad Company, standing alone and unqualified, state facts sufficient to entitle Staudt to the relief which he seeks against the Railroad Company.

The Railroad Company contends, however, that these particular allegations do not stand alone and are not without qualification, but that, on the contrary, whatever legal efficacy they may appear at first blush to possess is invalidated by the other allegations of the cross-complaint revealing that the action had been dismissed as to the Receivers by virtue of the judgment of Judge Grady sustaining their demurrer to the plaintiff's complaint. To support its position in this respect, the Railroad Company advances these interdependent arguments: (1) That Judge Grady entered the judgment sustaining the demurrer of the Receivers to the plaintiff's complaint upon the ground that the negligence charged against Staudt by such complaint was the sole proximate cause of the plaintiff's injury; (2) that in consequence the judgment of Judge Grady

sustaining the demurrer to the plaintiff's complaint constituted an adjudication that the Receivers and Staudt were not joint tort-feasors in causing the injury to plaintiff, and that by reason thereof the Receivers are not subject to any liability for contribution to Staudt under G.S. 1-240 in case the plaintiff recovers judgment against Staudt for the injury; (3) that this adjudication became conclusive "both as to plaintiff and defendant Staudt when plaintiff failed to take advantage of the provisions of the order sustaining the demurrer which allowed plaintiff thirty days in which to file amended complaint and both plaintiff and defendant Staudt failed to appeal from the order sustaining the demurrer"; and (4) that the promise of the Railroad Company to assume responsibility for the alleged contingent liability of the Receivers for contribution to Staudt is devoid of legal force since it has been thus judicially determined that no such liability exists.

We are unable to accept the contention of the Railroad Company that the judgment of Judge Grady sustaining the demurrer of the Receivers to the plaintiff's complaint constitutes an estoppel precluding Staudt from prosecuting his cross-complaint against the Railroad Company. The cases cited by appellant, to wit, *Swain v. Goodman,* 183 N.C. 531, 112 S.E. 36, and *Marsh v. R. R.,* 151 N.C. 160, 65 S.E. 911, are inapposite. They merely enunciate the established rule that an unreversed judgment sustaining a general demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action against the defendant will bar another action by the same plaintiff against the same defendant based on the same allegations of fact.

A demurrer tests the legal sufficiency of the pleading demurred to, admitting for the purpose the truth of all matters and things alleged therein. *Davis & Co. v. Blomberg,* 185 N.C. 496, 117 S.E. 497. As Staudt was not a party to the complaint of the plaintiff or the demurrer of the Receivers, he was not concerned with the solitary issue of law joined between them thereon, *i.e.,* whether the complaint stated facts sufficient to constitute a cause of action in favor of the plaintiff against the Receivers. This being so, the judgment of Judge Grady settling this issue of law adversely to plaintiff in no way injured Staudt or jeopardized any of his rights. Consequently, he was not a "party aggrieved" by the judgment in question and had no right to appeal therefrom. G.S. 1-271; *Freeman v. Thompson, supra; Irvin v. Harris,* 182 N.C. 647, 109 S.E. 867. Besides, Staudt could not force the plaintiff to take an appeal, *Electrical Accessories Co. v. Mittenthal,* 146 App. Div. 647, 131 N.Y.S. 433; or compel him to amend his complaint, *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126.

It is apparent that the Railroad Company has misapprehended the nature and scope of Judge Grady's judgment. It was not in any sense

an adjudication that the Receivers and Staudt were not joint tort-feasors in causing the injury to plaintiff, and that by reason thereof the Receivers are not subject to any liability for contribution to Staudt in case the plaintiff recovers judgment against Staudt for the injury in suit.

A few observations will demonstrate the correctness of this view. The plaintiff's complaint is one pleading, and the answer of Staudt is another. The cross-complaint is predicated upon the allegations of the answer, and not upon those of the complaint. *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; *Godfrey v. Power Co.,* 223 N.C. 647, 27 S.E. 2d 736, 149 A.L.R. 1183; *Smith v. Kappas,* 218 N.C. 758, 12 S.E. 2d 693. The demurrer of the Receivers challenged the legal sufficiency of the complaint, and not that of the answer. In consequence, the judgment of Judge Grady sustaining the demurrer of the Receivers to the complaint determined nothing more than that the complaint, as presented by the plaintiff, was insufficient in so far as it attempted to state a cause of action in favor of the plaintiff against the Receivers. 41 Am. Jur., Pleading, section 252. Hence, the ruling of Judge Grady had no relation to or effect upon the cross-complaint embodied in Staudt's answer. Indeed, that pleading did not even exist when the Receivers interposed their demurrer to the plaintiff's complaint, and Judge Grady made his ruling thereon.

What has been said compels the conclusion that the cross-complaint of Staudt against the Railroad Company states facts sufficient to entitle Staudt to the relief which he seeks.

This completes our task on the present record. Neither the plaintiff nor the Railroad Company questions the right of Staudt to utilize the cause of action stated in his cross-complaint as a cross-action against the Railroad Company in this case under the rules of practice prevailing in this jurisdiction. For this reason, we let this sleeping dog lie.

The judgment overruling the demurrer of the Railroad Company to the answer of Staudt is

Affirmed.

HOOPER JOHNSON v. J. D. ORRELL.

(Filed 30 November, 1949.)

1. Principal and Agent § 2—

The relationship of principal and agent must be created by mutual agreement and cannot be created by one party *in invitum.*

2. Brokers § 3—

Where the owner of land has neither listed his property with a broker nor in any way engaged him to sell the property, no presumption of agency arises from the mere fact that the broker has contacted the owner with a prospective purchaser and that a sale has been consummated.

3. Same—

Where a broker declares upon a written contract for the recovery of commissions, his rights must stand or fall upon the contract and he may not establish the relationship of principal and agent through the negotiations of the parties culminating in the sale of the property.

4. Brokers § 10: Alteration of Instruments § 1—

Where a broker, after the execution of the contract for the sale of property, inserts in the vendor's copy a provision for the payment of commissions, the vendor is not bound by the alteration unless he ratifies it, which involves both knowledge of the alteration and intent to ratify, and the mere fact that the contract as altered was left in the possession of the vendor does not put him on constructive notice of the alteration and is insufficient to establish ratification.

DEFENDANT'S appeal from *Hamilton, Special Judge,* April 1949 Term, NEW HANOVER Superior Court.

The plaintiff operated a real estate agency in the City of Wilmington, buying and selling real estate for others as agent, and charging and receiving a commission on property sold for others "while acting as their agent."

He brings this action to recover $750 which he claims as the balance of $1,250 due him on a written contract for the sale of defendant's land to a "client" under the following circumstances:

The client named by the plaintiff was R. L. Brinson. The subject property, located on the west bank of the Cape Fear River opposite the City, was an extensive area, occupied by a warehouse, with a wharf for loading and unloading craft on the river. Mr. Brinson was engaged in the sale of oil, and transportation of oil between Wilmington and High Point, and interested in the location of a convenient site for the repair and storage of Diesel engines. Mr. Brinson contacted the plaintiff some weeks before and the latter, at his instance, searched the vicinity for a suitable site, and found none which would be satisfactory to Brinson except the location owned by Orrell, which seemed to be in an inactive state, although still in use by Orrell. He showed the property to Brinson, who, having examined it and finding it extensive enough for the purpose, said he would take it.

"I obtained a contract with Mr. Brinson to buy this property from Mr. Orrell; took Mr. Brinson over and he looked at the land, said he would take it; came back to Mr. Orrell's office, and I told him we wished to

enter into this contract. He said he had no stenographer, and I used his typewriter and made two copies and gave them to Mr. Brinson and Mr. Orrell to sign. On the copy for Mr. Orrell and on the copy I held I wrote the amount of commission. That did not appear on the purchaser's copy."

"I took Mr. Orrell's copy to the machine and inserted the regular rate of commission in there."

Brinson paid $500 on the purchase price as testified by plaintiff, giving him the means with which to pay it to Orrell. Mr. Brinson said that if he was no longer needed he would be on his way, and left for the car with his copy.

"On that contract that is Mr. Brinson's signature, and that is my original signature, both are original signatures. That is the original contract retained by me. I gave Mr. Orrell an exact copy of the contract; made two copies of the original and gave Mr. Orrell one and Mr. Brinson one." Some question arising as to the time it would take to complete the transaction, Mr. Brinson paid the further sum of $1,500 on the contract, $1,000 of which he says he gave to Orrell and $500 of which he put in escrow until the transaction was completed. Ultimately Brinson paid $12,500. On cross-examination plaintiff stated, "Mr. Brinson did not pay the money at his first contract with Mr. Orrell, I had the money. I received $1,500 later to extend the contract; he said he would have to have $1,000 to extend it; the other $500 was held in escrow until consummation of the sale. I think I mailed it to him after a telephone conversation. Mr. Bellamy gave Mr. Orrell the balance of the purchase price, including two of my checks, that could not be prevented . . . the purchase price was paid and included one or two of my checks." . . . Witness did not remember whether he delivered or mailed the $1,000 to Mr. Orrell, didn't know if Mr. Bellamy gave Mr. Orrell two of his checks at the conclusion of the sale, he must have given them to Mr. Bellamy; did not give them to Mr. Orrell.

Various witnesses who were introduced, who professed to be acquainted with the customs observed in the sale of real estate through the offices of realtors, testified that the customary fee for selling property within the City of Wilmington was five per cent, and that for selling it outside Wilmington was 10 per cent, and that the property was outside the City limits.

This testimony was objected to by the defendant on the ground that he had sued on a specific written contract, stating the amount of commissions, and the objection was overruled. It was admitted that the subject property had not been listed with the plaintiff or any other real estate agency.

J. D. Orrell testified that when he was contacted by Mr. Johnson over the phone and asked if he wanted to sell his property on the west bank of the Cape Fear River, he told him he didn't know whether he wanted to sell and didn't know whether Johnson had enough money to buy. Johnson said he had a client who had money and asked defendant what he would take for it, and was told he would take $12,000 net. Later he had to go to his warehouse to get some machinery and found Johnson and his client Brinson there and they asked him about the lines and distances in feet. Johnson said they would be in defendant's office in a few minutes to discuss this. Defendant stated he had not been in his office more than five minutes before they came and Brinson asked him about the length and width of the property. He showed Brinson the deed to the property and he said it was sufficient.

Brinson then paid him on the trade five $100 bills and they went into negotiations about the time it would take to complete the contract and about the fact that Orrell had some equipment in the building. Defendant had in mind to see an attorney and have the contract drawn, but Mr. Johnson said he had a regular real estate form of contract, giving to witness one in blank. Both read it and witness said he saw nothing wrong with it; they were just two pieces of paper. Johnson said he could draw it up as good as an attorney, stepped to the typewriter and knocked it right off; gave him one copy and Mr. Brinson one copy to sign. Witness signed one copy and Brinson another, and swapped. When Mr. Brinson said he had to be going he walked out of the office and Mr. Johnson said, "let me see that contract," and he gave it back to him, and that is the last time he had seen the paper. Witness identified copy of paper which was given to Brinson by Johnson, stating that he had come in possession of it by calling Mr. Brinson on the telephone, telling him what had happened. Johnson had brought this suit. Brinson mailed him the copy in a registered letter. Witness testified that this was the only copy of the agreement between himself and Mr. Brinson, and Mr. Johnson that he ever saw except the copy Johnson sent him later at his request. Then he discovered what had been written into the contract.

The defendant stated that he first received $500 of money, then Mr. Johnson's check for $850, the check from the purchaser for $10,500 on the same day, when the purchase was closed. These checks were exhibited. Witness stated he never received $1,000 for the extension of the contract; never received 15 per cent. He stated that when Mr. Johnson got these first two checks deposited there was no mention of commission being taken out in the transaction; said the property was sold on a flat basis. The difference in the stamps on the deed would make the payment accepted by defendant as $12,000 even money. The witness stated that Mr. Bellamy was not his attorney.

Witness stated that after the agreement on the contract was signed Mr. Johnson was writing something and carried it off with him. He didn't know what he was writing on or whether he was writing on the contract, and that he did not investigate it but heard him writing. He was talking to Mr. Brinson and since Mr. Johnson wrote on it he hadn't seen the contract; that in fact witness went to the car with Mr. Brinson and talked with him about the oil and the trucks. Johnson had already handed witness a copy of the agreement but witness had handed it back to him.

The copy of the contract witness got from Mr. Brinson did not have the 10 per cent commission in it. If it had been, he would not have signed it.

The reason he called Mr. Johnson for a copy of the contract was because the time was about to elapse. There was a dispute between them about whether Johnson had given the contract to witness; but the copy mailed to him had a 10 per cent commission written in it and witness immediately told him it was a bogus contract. He never made any demand on him for the $750 until he instituted the suit.

Witness stated that he had never received a penny after the $500 was paid until the transaction was closed up and in that he received the balance of the money from Mr. Bellamy who was not his attorney. That is to say the checks of Johnson and $10,500 direct from Brinson.

At the conclusion of the plaintiff's evidence the defendant demurred thereto and asked for judgment of nonsuit, which was overruled. And again at the conclusion of all the evidence the defendant renewed his demurrer and motion for nonsuit, which was declined, and defendant excepted. The evidence went to the jury and the issues were answered against the defendant.

The defendant moved to set aside the verdict for errors of law, which motion was also overruled, and defendant excepted. To the ensuing judgment defendant excepted, appealed, assigning as errors the admission of the evidence of the customs of realtors as above stated, and the overruling of his motions for judgment as of nonsuit.

Rodgers & Rodgers for defendant, appellant.

W. K. Rhodes, Jr., for plaintiff, appellee.

SEAWELL, J. The plaintiff is relying on a specific written contract between himself and the defendant on which to recover from the latter the commission he claims. The evidence, *dehors* the document, would hardly establish the relation of agency between the plaintiff and the defendant at all. Agency is the product of a mutual agreement. It is a situation which cannot be forced on a person *in invitum,* and no presump-

tion or inference of agency arises from the fact that a realtor, with a buying client, has contacted a person willing to sell, and has consummated the sale. The defendant had not listed his property with plaintiff or initiated any relation of that sort. Whether, in the course of the negotiations the plaintiff had succeeded in, so to speak, backing himself into that position, might have been a question for the jury except for the fact that the plaintiff, as stated, sued on an alleged written contract, and his rights must spring out of that writing, or fall with it.

The circumstances surrounding the alteration in the contract of sale between Brinson and Orrell are markedly unusual. After the contract between these two had been read, approved and signed in duplicate, and Brinson, considering the business finished, took his copy and retired, plaintiff took the copy and without calling the attention of Orrell to what he was doing, typed into the body of it an alteration to the effect that the sale was subject to a commission of 10 per cent in favor of himself. This, he says, he gave to Orrell. Orrell says he did not. The dispute over this detail is not conclusive. Since the plaintiff admits that the matter constituting the alteration was made after both Brinson's and Orrell's signatures had been placed on the document (which had been made in duplicate) it could only become effectual by way of ratification and this must be both with the knowledge of the party to be charged as well as with the intent to ratify.

> "In order that any acts of the party may be constituted as ratification of an alteration, the particular act must be done with the full knowledge of the alteration."
>
> "The party must have knowledge in fact, and it is not sufficient that he had means of knowledge." 3 C.J.S., Alteration of Instruments, sec. 78.

This is certainly true unless the circumstances are such as to put the duty on the party charged to further examine the instrument, or such as to put him on constructive notice, neither of which appears here. Johnson assumes that Orrell read it because he gave it to him—passes from that assumption to the statement, "I know he read it," which must be considered in connection with the only indication of knowledge as to which he testified, that Orrell had the paper.

The evidence discloses that there had been serious controversy between the plaintiff and the defendant about the matter of commissions—the defendant declaring that plaintiff was Brinson's agent and that he had offered him a flat price, plaintiff contending that he owed him commissions at 10 per cent. This emphasizes the duty of plaintiff under the circumstances to have brought to the attention of defendant the alteration

he admits having made over defendant's name without first getting his consent.

Looking at the evidence as a whole we do not deem it sufficient to go to the jury as bringing to the knowledge of the defendant the alterations made in the Orrell-Brinson contract in favor of himself, over the signature of the parties, a thing necessary to its validity.

The plaintiff took the very unusual method of inserting a clause for his benefit under a misleading heading on a contract made *inter alios* and we cannot see that there is any presumption that the possession of the paper by the party charged, even if it had been admitted, was sufficient in law or in fact to put him on constructive notice of the alteration.

Ratification is as effectual in law as original execution. But it is not sufficiently evidenced in this case to make it a jury question.

The motion for judgment of nonsuit should have been allowed. The judgment to the contrary is

Reversed.

D. W. FAWLEY v. EARL BOBO AND H. W. BRASINGTON.

(Filed 30 November, 1949.)

1. Negligence § 16—

It is not necessary that defendant plead "contributory negligence" *eo nomine*, it being sufficient if he pleads as a bar to plaintiff's cause facts and circumstances which amount to contributory negligence.

2. Automobiles §§ 8b, 18h (3)—Driver ramming rear of vehicle he was following on highway held contributorily negligent as matter of law.

The accident in suit occurred when plaintiff's tractor-trailer, following defendants' tractor-trailer on the highway at night, rammed the rear of defendants' vehicle when it suddenly stopped on the highway. Plaintiff's allegations and evidence were to the effect that defendants' vehicle suddenly stopped without signal by hand or electrical device. Plaintiff's driver testified that he was familiar with the highway and knew he was approaching an intersection where traffic was congested, that he was traveling between 110 and 115 feet behind defendants' vehicle, that he did not see it had stopped until he was within 75 feet of it, that he immediately put on his brakes but was too close to stop before hitting its rear. *Held:* Plaintiff's evidence discloses contributory negligence as a matter of law barring recovery.

3. Negligence § 11—

It is not necessary that contributory negligence be the sole proximate cause in order to bar recovery by plaintiff, it being sufficient if it is one of the proximate causes of the injury.

APPEAL by plaintiff from *Gwyn, J.*, at July Term, 1949, of RICHMOND.

FAWLEY *v.* BOBO.

Civil action to recover property damage sustained in motor vehicle collision allegedly resulting from actionable negligence of defendants.

The collision in question is alleged to have occurred at 2 o'clock a.m., on 19 August, 1948, on U. S. Highway No. 1 immediately south of the town of Rockingham, Richmond County, North Carolina. At the time, the International tractor and trailer owned by defendant Brasington, and operated by defendant Earl Bobo, and loaded with hogsheads of tobacco, was traveling in a northeasterly direction along said highway; and the auto-car tractor and trailer, owned by the plaintiff and operated by one James F. Vann, was also traveling in a northeasterly direction along said Highway, and following the said tractor and trailer of defendant Brasington.

Plaintiff alleges in pertinent part in his complaint: "6. That as the defendant Brasington's International tractor and trailer, loaded with tobacco, approached the intersection of U. S. Highway 1 with the Rockingham-Hamlet Airport hard-surfaced road, the defendant Earl (Bobo) without any warning signals of any type, immediately stopped his tractor and trailer on said Highway and before the driver of the plaintiff's tractor and trailer, because of the absence of signal, could determine that the defendant's tractor and trailer had immediately stopped on said Highway, the plaintiff's tractor and trailer was too close to the defendant's tractor and trailer to avoid hitting it, although the plaintiff's driver immediately applied his brakes; that thereupon the plaintiff's tractor and trailer hit the rear end of the defendant Brasington's tractor and trailer, ramming the front end of the plaintiff's tractor and trailer up under the rear of the defendant Brasington's tractor and trailer, greatly damaging the tractor and trailer of the plaintiff."

And plaintiff alleges as acts of negligence on the part of defendant proximately causing the damage of which he complains, briefly stated: (1) That the defendant Earl Bobo carelessly and negligently brought his tractor and trailer from a reasonable running speed to an immediate stop on U. S. Highway No. 1 in the nighttime without giving any hand signal of any type whatsoever to warn the driver of the plaintiff's tractor and trailer, and without employing any electrical warning signal on the rear of his trailer to warn the vehicles traveling behind him and in the same direction; and (2) "that defendants Earl (Bobo) and Brasington were careless and negligent in the operation of said International tractor and trailer in that they did not have the proper electrical equipment on the rear of said trailer to warn vehicles traveling behind said tractor and trailer and if there were some warning electrical equipment on the rear of said defendant's tractor and trailer, the same was not in working order and the defendants knew or should have known that the same was not working. The defendants Earl (Bobo) and Brasington were operat-

ing said International tractor and trailer in the night-time on U. S. Highway No. 1 in direct violation to Section 20-154 of the General Statutes of North Carolina, and as a result of carelessness and negligence of the defendants Earl (Bobo) and Brasington, the driver of the plaintiff's tractor and trailer could not ascertain that the defendant's tractor and trailer was going to stop and when he did, it was too late for the plaintiff's driver, Vann, to stop his tractor and trailer, although he had good air brakes."

Defendants, in answer thereto, deny the allegations of negligence on their part, and also deny that "the tractor and trailer of the plaintiff was being driven at a reasonable rate of speed and at a lawful distance behind or to the rear of the tractor and trailer of the defendant, H. W. Brasington."

And, in further answer to the complaint, "and as a complete bar to plaintiff's alleged cause of action, and asking for damages against the plaintiff," the defendants aver: That as defendant Earl Bobo approached the suburbs of the town of Rockingham, N. C., it became necessary to cross a much traveled highway, running from Rockingham by the home of J. D. Chalk, at a filling station; that as Bobo came to the intersection a car was approaching him, and said Bobo slackened his speed to possibly five miles per hour in order to avoid colliding with said car; that the tractor and trailer of Brasington carried electric lights on the rear as required by the Motor Vehicle Laws of the different States, and, as Bobo slackened his speed and applied his brakes, he gave proper warning of his slowing down for the intersection both by the lights on the rear and body of the cab of the tractor and trailer; that the driver of plaintiff's tractor and trailer negligently and carelessly drove the tractor of plaintiff into the tractor of defendant Brasington with great force,—damaging it to the extent alleged; and "that the driver of plaintiff's tractor was not driving said tractor within the speed limits provided by the Motor Vehicle Laws of the State of North Carolina, and the lights on the tractor of the plaintiff were defective and if the lights on the plaintiff's tractor had been in proper shape and the driver of the plaintiff's tractor had been observing the road and other motor vehicles thereon, he could have and should have slowed down the tractor of the plaintiff, or, if necessary, have stopped the same without driving into the rear of the trailer of the said Brasington, and, because of said negligence of the driver of the plaintiff's tractor, the trailer of the defendant Brasington was smashed in the rear and damaged to the extent of $540.00." And defendant Brasington prayed the recovery of the amount alleged for damages to his trailer.

Plaintiff, replying to the answer of defendants, admits that as defendant Bobo approached the suburbs of the town of Rockingham he did come to the intersection of a side road which crosses U. S. Highway No. 1,

but denies that at the time a car was approaching said intersection, and denies that defendants gave any warning of stopping on the highway. And, plaintiff, replying to the further answer, alleges that the negligence of the agent of Brasington is imputed to him, and thus "by his own carelessness and negligence contributed to the damage of the defendant Brasington's trailer and tractor, if any," by the acts of negligence substantially as set forth in the complaint.

Upon the trial in Superior Court, J. F. Vann as a witness for the plaintiff, testified in pertinent part, briefly stated: That in August 1948 at the time of the collision, he had been a truck driver for five years—four years of it for plaintiff; that at time in question he was driving an auto-car tractor and trailer for plaintiff,—returning unloaded from Florida; that the tractor and trailer weighed over 22,000 pounds; that the tractor had straight air brakes, and the trailer straight air and vacuum brakes; that the lights on the tractor and trailer were in excellent shape, and on level road he could see down it with the lights between 200 and 300 feet; that after leaving Summerton, South Carolina, about 8 o'clock in the evening, and between 15 and 20 miles south of Rockingham he came up behind a tractor and trailer loaded with hogsheads of tobacco, and followed it from then on; that the tractor and trailer ahead was running between 40 and 45 miles per hour, the same as he was; that he was driving between 110 and 115 feet behind; that by his lights he could see the tractor and trailer ahead; that it, the trailer ahead, had 3 or 4 little clearance lights on the back of it; that the weather was clear; that the road of black asphalt, hard-surfaced for eighteen feet, was level at the point; that as he proceeded along this road, the truck of defendant Brasington stopped; that he did not see any hand signal given by the driver extending his hand; that there was no electric signal of any type on the back of the trailer indicating an intended stop; that defendant's driver was driving on the right-hand side of the road, as was plaintiff's driver when he determined that the truck ahead had stopped; that as soon as he could see that it had stopped, he applied his brakes but he was "too close on him," and the front part of his tractor hit the rear of the forward trailer; that he couldn't tell that the driver of the forward truck was slowing down and just stopped right in the road. And in answer to this question: "And when you determined that he had stopped you put on your brakes?", the witness replied, "Yes, sir."

This witness, under cross-examination, testified in pertinent part: That the brakes on this tractor and trailer were separate installations; that they could easily stop the vehicle, unloaded, in a short distance,—the brakes being built for loaded trucks; that he proceeded along behind Mr. Bobo for approximately 15 to 20 miles when he (Bobo) stopped at the hill; that he, the witness, is familiar with the roads around Rocking-

ham; that he had been running down there (meaning Miami) for about three years; that he knew that it is a congested area around at the top of that hill entering Rockingham at the intersection and the point of collision; that it is a much congested area, and going downhill where a road turns out to the mills at East Rockingham; that he was coming to the hill when the accident happened,—between one and two (meaning o'clock); that Earl Bobo did not slow down at all until he got to the intersection: Quoting the witness, "When I seen that he had stopped I was about 75 feet from him . . . he was sitting still in the road when I first seen him and I was 75 feet behind him . . . when I saw he was stopped I put on my brakes. The brakes did not have time to take hold. I was too close on him." Then in answer to this question, "There was a slight interval before the brakes—after you pressed the foot brakes—before the brakes catch hold?", the witness answered: "You running 45 or 40 miles and hit your brakes it takes a little time to stop with that much weight behind you . . . my brakes hadn't taken hold at the time that I hit it."

Plaintiff also offered evidence tending to show that his tractor was so damaged, as a result of the collision, that its reasonable market value of $6,000 immediately before the accident was reduced to $400 or $500 immediately after the accident for salvage.

At the conclusion of the evidence defendant moved for judgment as of nonsuit, and agreed to take a voluntary nonsuit on the counterclaim against plaintiff. Thereupon, the court being of opinion that the action of plaintiff should be nonsuited, so ordered and adjudged.

Plaintiff appeals therefrom to Supreme Court, and assigns error.

J. Elsie Webb and W. G. Pittman for plaintiff, appellant.

Bynum & Bynum for defendants, appellees.

WINBORNE, J. Two questions are presented by appellant for decision on this appeal:

First, it is contended that defendants do not plead the contributory negligence of the driver of plaintiff's tractor and trailer. True, the acts of negligence averred against the said driver are not characterized as "contributory negligence," but defendants plead "as a complete bar to plaintiff's alleged cause of action" facts and circumstances which amount to contributory negligence. Therefore, the contention so made is not well founded.

Second, plaintiff contends that evidence offered on the trial below, taken in the light most favorable to plaintiff, is sufficient to take the case to the jury.

As to this contention, if it be conceded that there is evidence tending to show that the defendant Earl Bobo was negligent in the operation of

the tractor and trailer of defendant Brasington, and that such negligence was a proximate cause of the collision, the evidence as to negligence on the part of the driver of plaintiff's tractor leads to the inevitable conclusion as a matter of law that he was guilty of negligence which caused or contributed to the collision and consequent damage to plaintiff's tractor and trailer. The evidence brings the case within the line of decisions listed by *Stacy, C. J.*, in *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251, in which contributory negligence has been held as a matter of law to bar recovery. To like effect are these later cases: *Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Brown v. Bus Lines,* 230 N.C. 493, 53 S.E. 2d 539; *Wilson v. Motor Lines,* 230 N.C. 551, 54 S.E. 2d 53; *Hollingsworth v. Grier, ante,* 108, and cases cited.

It is sufficient to defeat recovery if plaintiff's negligence is one of the proximate causes of the injury. It need not be the sole proximate cause. *Wilson v. Motor Lines, supra,* and cases there cited.

After full consideration of assignments brought forward and presented, error is not made to appear. Hence, the judgment below is

Affirmed.

EMMA JENKINS v. CITY COACH COMPANY.

(Filed 30 November, 1949.)

1. Carriers § 21a (1)—

A motor carrier of passengers for hire is not an insurer of their safety but may be held liable for personal injuries proximately caused by its failure to exercise the highest degree of care for their safety compatible with the practical operation of its business.

2. Carriers § 21b—Evidence held insufficient to show that bus driver failed to use highest degree of care for safety of passengers.

Evidence that a bus was being operated on its right side of a highway in a careful manner at a lawful speed and that a car approaching from the opposite direction, traveling on its right side of the highway, suddenly swerved to the left and crossed the highway, striking the front end of the bus, and that the bus slowed down immediately before the accident and was turned to its right so that its front wheels were off the hard surface on the right side at the time of impact, *is held* insufficient to be submitted to the jury in an action by a passenger for injuries received in the accident notwithstanding evidence that immediately before the accident the driver was laughing and talking with passengers, since slowing the bus and turning it to the right in the short time the danger was apparent discloses that the driver was paying due attention to the road, and the driver may not

be held to the duty of anticipating the sudden unlawful movement of the automobile.

3. Automobiles § 13—

A motorist driving on his right side of the highway is not required to anticipate that a vehicle approaching from the opposite direction on its own side of the road will suddenly turn into his path, but has a right to expect that the approaching vehicle will remain on its own side of the road until the vehicles meet and pass in safety.

APPEAL by plaintiff from *Bobbitt, J.*, at the August Term, 1949, of GASTON.

The plaintiff, Emma Jenkins, a fare-paying passenger, sued the defendant, City Coach Company, a motor vehicle carrier engaged in transporting passengers for hire between various cities and towns in Gaston County, for damages for personal injuries suffered by her in a collision between a motor bus of the defendant and an automobile driven by some third person, which occurred 31 August, 1948, on a public highway connecting Gastonia and Ranlo. The complaint alleged "that just before the automobile . . . met the bus, the automobile swerved sharply to the left and crossed the highway, striking the front end of the bus, completely wrecking the automobile, damaging the bus, and causing this plaintiff to be thrown from her seat and injured" and that the driver of the defendant's bus "was negligent and careless in the operation of the bus in that he . . . was not observing the highway on which he was driving at all, and made no effort to stop the bus or do anything else to avoid a collision, which he should have reasonably expected under the circumstances."

The testimony presented by the plaintiff tended to show that the highway was hard surfaced; that the bus was traveling towards Gastonia, and the automobile towards Ranlo; that the bus had stopped "to let passengers on and off at the Ranlo Crossroads" 200 yards from the place of the accident and "had not gotten back into regular speed when the collision occurred"; that as the two vehicles met and collided, the bus was being operated upon the right half of the highway in the direction in which it was proceeding; that "the bus slowed down immediately before the accident," was driven "kind of off the hard surface on the right side of the road," and came to rest after the impact with its front end "off the road" and its rear end "in the road"; that before the accident "there was talking and laughing at the front of the bus between part of the passengers and the bus driver" and "the bus driver turned his head to the right and said something" to one of the passengers; and that the witnesses for the plaintiff "did not know which way his head was turned" at the time of the collision.

When the plaintiff had introduced her evidence and rested her case, the court allowed the motion of the defendant for a compulsory nonsuit

under G.S. 1-183, and entered judgment accordingly. The plaintiff excepted and appealed, assigning this ruling as error.

John A. Wilkins and S. B. Dolley for plaintiff, appellant.
W. M. Nicholson and Porter B. Byrum for defendant, appellee.

ERVIN, J. A motor vehicle carrier for compensation is not absolutely liable to its passengers for personal injuries sustained by them in the course of their transportation. But it does owe to its passengers the duty of exercising the highest degree of care for their safety compatible with the practical operation of its motor vehicles, and is legally accountable to them for personal injuries proximately caused by its negligence in failing to perform such duty. *Humphries v. Coach Co.*, 228 N.C. 399, 45 S.E. 2d 546; *White v. Chappell*, 219 N.C. 652, 14 S.E. 2d 843.

The appeal presents this problem: Was the evidence adduced by plaintiff at the trial sufficient to show the essential elements of a cause of action under this rule?

The plaintiff maintains that this question should receive an affirmative answer. To support this position, she lays hold upon the testimony that before the accident the bus driver was talking and laughing with passengers seated near the front of the bus, and on that basis alone invokes a triple inference: (1) That since he was talking and laughing, the bus driver did not observe the highway ahead; (2) that since he did not see the highway ahead, he did not anticipate that the automobile would suddenly swerve across the highway and strike the bus just as the two vehicles met; and (3) that since he did not foresee the untoward swerving of the automobile, he "made no effort to stop the bus or do anything else to avoid a collision, which he should have reasonably expected under the circumstances."

The wisest of men noted the therapeutic property of laughter centuries ago, and preserved his discovery in the uplifting proverb: "A merry heart doeth good like a medicine." A poet of a later age and clime has declared that "there's nothing worth the wear of winning but laughter and the love of friends." For these reasons, the law ought not to do such a solemn thing to life as to discountenance laughter unless it is forced to do so by the direst of compulsions. Besides, there may be more than a modicum of scientific truth in the oft repeated assertion that man is distinguished from other animals merely by his capacity to laugh, and we would be reluctant, indeed, to adjudicate with grave mien in any case that possibly the only characteristic difference between man and beast constitutes evidence that man is a negligent creature. Happily, the record on this appeal saves us from so gloomy a task. It negates the two prerequisites to liability, to wit, negligence and proximate cause.

The evidence of the plaintiff discloses with positiveness that the operator of the bus was driving in a careful manner and at a lawful speed upon the proper side of the highway as he approached and met the automobile. *Brown v. Truck Lines,* 229 N.C. 122, 47 S.E. 2d 711. Moreover, it compels the conclusion that he was keeping a vigilant lookout for vehicles approaching from the opposite direction. This is made certain by the testimony showing that despite the sudden and unexpected deflection of the automobile, the driver of the bus took immediate steps to extricate the bus and its occupants from the ensuing peril by reducing the speed of the bus and attempting to drive it from the paved highway onto the dirt shoulder to his right.

The law does not expect clairvoyance of operators of motor vehicles. A motorist, who is proceeding on his right side of the highway, is not required to anticipate that an automobile, which is coming from the opposite direction on its own side of the road, will suddenly leave its side of the road and turn into his path. He has the right to assume under such circumstances that the approaching automobile will remain on its own side of the road until the vehicles meet and pass in safety. *Brown v. Products Co., Inc.,* 222 N.C. 626, 24 S.E. 2d 334; *Hancock v. Wilson,* 211 N.C. 129, 189 S.E. 631; *James v. Coach Co.,* 207 N.C. 742, 178 S.E. 607; *Cory v. Cory,* 205 N.C. 205, 170 S.E. 629; *Shirley v. Ayers,* 201 N.C. 51, 158 S.E. 840.

The judgment of nonsuit is

Affirmed.

STATE v. MARION CRANFORD, DONALD RAY ROBERTSON AND JOHN H. McMAHON, JR.

(Filed 30 November, 1949.)

1. Criminal Law § 28—

The State must prove defendant's guilt beyond a reasonable doubt.

2. Criminal Law § 52a (3)—

Evidence tending to show that upon the arrival of police officers at the scene of a break-in in response to a telephone call, they saw the three defendants running up the street, that defendants got into a car and drove quickly away and were not stopped by the officers until after a ten mile chase, and that appealing defendant denied any knowledge of the break-in, *is held* insufficient to be submitted to the jury, and judgment of nonsuit is allowed in the Supreme Court on appeal. G.S. 15-173.

APPEAL by defendant, Donald Ray Robertson, from *Crisp, Special Judge,* June, 1949, Special Criminal Term, of MECKLENBURG.

STATE *v.* CRANFORD.

Criminal prosecution on indictment charging the appealing defendant and two others with breaking and entering an industrial plant with intent the goods and chattels therein, the property of the owner, to steal and carry away.

In response to a telephone call, shortly before 2:00 a.m., 28 May, 1948, three members of the Charlotte police force arrived at the plant of the Coca-Cola Bottling Company, situate on Morehead Street, near Summit Avenue, and immediately thereafter saw three boys cross Morehead Street and run up Summit Avenue about a quarter of a block away. One of the officers identified the boys as McMahon, Cranford and Robertson (defendants herein). The three boys entered a Terraplane-Hudson automobile and drove quickly away. The officers gave chase and stopped them after a run of about ten miles. McMahon who was driving told the officer "the reason he didn't stop was that he had no driver's license." The car when stopped was occupied by the three defendants herein.

Upon investigation it was found that a window of the Coca-Cola plant had been entered and two desks opened, but nothing particularly disturbed. The only thing missing was a coin changer, and that was found the next morning under a bush just outside the window that had been entered.

When questioned about the break-in, the appealing defendant Robertson told the police that he knew nothing about it.

All three of the occupants of the Terraplane-Hudson automobile were taken into custody, all were indicted herein, convicted and each sentenced to the State's Prison for a term of not less than three nor more than five years.

The defendant Robertson appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Elbert E. Foster and J. F. Flowers for defendant.

STACY, C. J. Undoubtedly the record points an accusing finger at the appealing defendant as one of the participants in the crime here charged. But this would seem to be all. A careful scrutiny of the evidence leaves us with the impression that it falls short of the degree of proof required to convict a defendant in a criminal prosecution. It all may be true, and yet the appealing defendant may be innocent. *S. v. Goodson,* 107 N.C. 798, 12 S.E. 329; *S. v. Tillman,* 146 N.C. 611, 60 S.E. 902; *S. v. Montague,* 195 N.C. 20, 141 S.E. 285; *S. v. Battle,* 198 N.C. 379, 151 S.E. 927; *S. v. Shu,* 218 N.C. 387, 11 S.E. 2d 155; *S. v. Penry,* 220 N.C. 248, 17 S.E. 2d 4. In *S. v. Penry, supra,* it is said: "The State's case

fails at the first hurdle," and in the present case we are inclined to the view that it does so in the end at least.

The State must prove his guilt beyond a reasonable doubt. *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Warren,* 228 N.C. 22, 44 S.E. 2d 207; *S. v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676; *S. v. Godwin,* 227 N.C. 449, 42 S.E. 2d 617; *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Miller,* 212 N.C. 361, 193 S.E. 388; *S. v. Schoolfield,* 184 N.C. 721, 114 S.E. 466.

We hold that on the present record the prosecution has failed to make out a case against the appealing defendant. His demurrer to the evidence or motion for judgment in case of nonsuit will be allowed here. G.S. 15-173; *S. v. Ray,* 229 N.C. 40, 47 S.E. 2d 494; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Wrenn,* 198 N.C. 260, 151 S.E. 261.

Reversed.

SMITH BUILDERS SUPPLY, INC., v. H. B. RIVENBARK, RECEIVER OF J. F. CASEY, INCOMPETENT, DELVA RAWLS CASEY, WIFE OF J. F. CASEY, G. DUDLEY HUMPHREY, TRUSTEE, AND F. E. LIVINGSTON, TRUSTEE.

(Filed 30 November, 1949.)

Mortgages § 12: Laborers' and Materialmen's Liens § 8—

A purchase money deed of trust stands upon the same footing as a purchase money mortgage, and its lien is superior to the lien for material which was begun to be furnished the purchaser while he was in possession under a lease with option to purchase, since no lien against the purchaser could attach prior to the lien of the deed of trust, the execution of the deed and the deed of trust being regarded as but one transaction.

APPEAL by plaintiff from *Hamilton, Special Judge,* April Term, 1949, of NEW HANOVER. Affirmed.

Plaintiff instituted this action to recover for materials furnished for the erection of a building on lands of defendants Casey, and to enforce lien therefor which had been filed under the statute (G.S. 44-1), 12 September, 1947.

It was agreed that plaintiff began furnishing material 2 June, 1947, and that balance due therefor was $1,487. It was also agreed that defendants Casey had entered the land in May, 1947, under a lease with option to purchase; that Casey had exercised the option 31 July, 1947, and that simultaneously with the execution and delivery of deed from the vendors to them Casey and wife executed deed of trust to H. Dudley Humphrey to secure $4,000, the purchase price, loaned by J. O. Hinton.

The deed and deed of trust were recorded 31 July, 1947. Subsequently the deed of trust was foreclosed with no excess over the debt secured.

It was agreed that only an issue of law was raised, and that the facts set out in the pleadings were true. Thereupon it was adjudged that the deed of trust to Humphrey, trustee, to secure Hinton was a purchase money deed of trust, and superior to the lien of the plaintiff for materials furnished.

Plaintiff appealed.

Stevens, Burgwin & Mintz for plaintiff, appellant.

Kellum & Humphrey for defendants, appellees.

DEVIN, J. The court below has ruled correctly upon the admitted facts here presented. The lien of the deed of trust to secure the purchase money loaned, which had been executed and recorded simultaneously with the deed to the vendees, was superior to that of the materialman.

The principle has been uniformly upheld here that a deed and a mortgage to the vendor for the purchase price, executed at the same time, are regarded as one transaction. The title does not rest in the vendee but merely passes through his hands, and during such instantaneous passage no lien against the vendee can attach to the title superior to the right of the holder of the purchase money mortgage. *Bunting v. Jones,* 78 N.C. 242; *Moring v. Dickerson,* 85 N.C. 466; *Hinton v. Hicks,* 156 N.C. 24, 71 S.E. 1086; *Humphrey v. Lumber Co.,* 174 N.C. 514, 93 S.E. 971; *Chemical Co. v. Walston,* 187 N.C. 817 (825), 123 S.E. 196; *Trust Co. v. Brock,* 196 N.C. 24, 144 S.E. 365. And this rule is equally applicable where a third party loans the purchase price and takes a deed of trust to a trustee to secure the amount so loaned. *Moring v. Dickerson, supra; Chemical Co. v. Walston, supra; Trust Co. v. Brock, supra.* The cases cited by appellant may not be held controlling on the facts here presented.

Judgment affirmed.

STATE v. WILLIE WILLIAMS.

(Filed 30 November, 1949.)

1. Homicide § 25—

Evidence that while bathing in a pond, defendant went to where deceased was standing in shallow water holding to a post, and against her will and over her protest that she could not swim, pulled her into deep water where she drowned, is sufficient to be submitted to the jury on the charge of involuntary manslaughter.

2. Homicide § 8a—

Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice, but proximately resulting from the commission of an unlawful act not amounting to a felony, or to some act done in an unlawful or culpably negligent manner, when fatal consequences are not improbable under all of the facts existent at the time.

APPEAL by defendant from *Bobbitt, J.*, May Term, 1949, of MOORE. No error.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

H. F. Seawell, Jr., for defendant.

DEVIN, J. The defendant was convicted of manslaughter in causing the death by drowning of one Dorothy Lynn Smith. From judgment imposing prison sentence the defendant appealed.

The question chiefly debated here was whether the evidence was sufficient to sustain the charge of involuntary manslaughter. The State's evidence tended to show that on 1 September, 1947, several woman and children were bathing in West End pond which was shallow near the banks, but deepened to 10 or 12 feet in the center. The defendant, a man 30 or 35 years of age, approached and inquired why the bathers didn't go out where they could swim, and followed this by wading out into the water. All ran out of the pond except the deceased, a girl 16 years of age, who in water not more than waist deep was holding to a post. In spite of her objection defendant took hold of her, and, although she repeatedly told him she could not swim, pulled her away from the post, and both fell over in the deep water and she was drowned.

We think defendant's motion for judgment of nonsuit was properly denied.

There was no evidence of malice, or that the defendant intended to drown the girl, but against her will and over her protest that she could not swim he pulled her into deep water where she drowned. True the defendant came near drowning also but that did not palliate his action. The fatal consequences to Dorothy Lynn Smith under the evidence must be ascribed to the defendant's unlawful and culpably negligent conduct which it could reasonably have been foreseen was likely to result in serious injury. *S. v. Scoggins*, 225 N.C. 71, 33 S.E. 2d 473; *S. v. Cope*, 204 N.C. 28, 167 S.E. 456; *S. v. Rountree*, 181 N.C. 535, 106 S.E. 669; *S. v. Tankersly*, 172 N.C. 955, 90 S.E. 781. Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negli-

gent manner (*S. v. Durham,* 201 N.C. 724, 161 S.E. 398; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580), and where fatal consequences of the negligent act were not improbable under all the facts existent at the time. *S. v. Tankersly, supra; S. v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638. In *S. v. Rountree, supra,* it was said that "Culpable negligence under the criminal law is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."

The defendant assigns error as to portions of the court's charge to the jury, but upon examination we find none of his exceptions can be sustained.

In the trial there was

No error.

STATE v. UZELLE JONES.

(Filed 30 November, 1949.)

Criminal Law § 80b (4)—

Where defendant fails to serve statement of case on appeal within the time allowed, motion of the Attorney-General to docket and dismiss will be granted, but when defendant has been convicted of a capital offense this will be done only after an inspection of the record proper fails to disclose error.

APPEAL by defendant from *Williams, J.,* at January Term, 1949, of HOKE.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

No counsel contra.

PER CURIAM. The defendant was convicted of murder in the first degree. Sentence of death by asphyxiation was imposed. Defendant gave notice of appeal, and was allowed thirty days to make and serve statement of case on appeal, and the State was allowed thirty days thereafter to file exception thereto, or to serve counter statement of case.

No case on appeal has been served, and the time for docketing appeals from the Ninth District for the Spring Term, of this Court, expired at 10:00 a.m., 26 April, 1949. *S. v. Moore,* 210 N.C. 459, 187 S.E. 586.

The Attorney-General moves to docket and dismiss the appeal. The motion must be allowed, but, according to our rule in capital cases, we

have examined the record to see if any error appears. We find no error therein. *S. v. Watson,* 208 N.C. 70, 179 S.E. 455.

Judgment affirmed.

Appeal dismissed.

H. L. CLARK v. INTERSTATE CONSTRUCTION CO., ET AL.

(Filed 30 November, 1949.)

APPEAL by defendant, Interstate Construction Company, from *Clement, J.,* February, 1949, Special Term, of MECKLENBURG.

Civil action to recover damages for alleged breach of building contract.

From verdict for the plaintiff, awarding damages in the sum of $5,000.00 and judgment thereon, the defendant, Interstate Construction Company, appeals, assigning errors.

J. Spencer Bell and Warren C. Stack for plaintiff, appellee.

J. M. Scarborough for defendant, appellant.

PER CURIAM. The appeal presents a question of evidence and a number of exceptions to the charge.

The exception to the evidence is without merit, and none of the exceptive assignments of error to the charge can be sustained. The record contains no exception to the inadequacy of the charge on the measure of damages, only exceptions to portions as given which are admittedly correct as far as they go.

In the absence of a more substantial showing, the verdict and judgment will be allowed to stand.

No error.

NYMPHUS GREEN HOUSE v. JOSEPH THOMAS HOUSE AND WIFE, LUCILLE BAILEY HOUSE; JAMES ALLEN HOUSE AND WIFE, VIRGINIA MOORE HOUSE; JOSEPHINE HOUSE, UNMARRIED; DOROTHY HOUSE WILLIAMS AND HUSBAND, H. BAGLEY WILLIAMS; WILLIE HOUSE PERRY AND HUSBAND, WILLARD E. PERRY; RUTH HARE HOUSE, WIDOW; ALLINE HOUSE MEYERS AND HUSBAND, CHARLES A. MEYERS; EDITH HOUSE KING AND HUSBAND, NEVINS F. KING; HARPER HILLMAN HOUSE, JR., UNMARRIED; TALMAGE WESLEY HOUSE, A MINOR; HOWARD MARSHALL HOUSE, A MINOR; REBECCA HOUSE, A MINOR; MANUELLA HOUSE, A MINOR; AND MARJORIE RUTH HOUSE, A MINOR.

(Filed 14 December, 1949.)

1. Wills § 31—

A will must be construed to ascertain and effectuate the intent of testator unless contrary to some rule of law or at variance with public policy, and to this end it is permissible for the courts to transpose words, phrases or clauses.

2. Wills § 33c—

The courts favor the early vesting of estates.

3. Same—Will held to devise fee defeasible upon death of daughter without issue her surviving.

Testator devised a life estate to his wife with provision that at her death his lands should be divided among his living children, with particular description as to the share each should take, with further provision that one daughter (who had living children at the time the will was executed) should take a life estate in her share with remainder to her children, and that his other named daughters and three named sons should have their share in fee simple forever "And if either one of my daughters shall die without issue, their share of the lands shall be equally divided among" the three named sons. *Held:* The words "shall die without issue" refer to the death of the devisees of the fee and not to the death of the life tenant, and the daughters took a defeasible fee so that upon the death of one of them without issue her surviving, her share became vested in the three named sons.

BARNHILL, J., dissenting.

APPEAL by interveners from *Hamilton, Emergency Judge,* from judgment signed out of term by consent, 30 June, 1949. From WAKE.

This is an action begun as a special proceeding before the Clerk of the Superior Court of Wake County, for the sale of lands for partition.

Mrs. Dorcas Sealey and husband, Wade Sealey, Mrs. Estelle Richards and husband, D. E. Richards, Mrs. Otelia Ferrell and husband, W. R. Ferrell, and Mrs. Metta Straughn, were allowed to intervene and file pleadings.

The interveners allege that the devise of lands to Martha Virginia Paschal, under the will of Thomas Wesley House, was a devise in fee

simple and that upon her death, the title to the lands vested in her heirs at law and next of kin.

Thomas Wesley House died leaving a last will and testament, which was duly probated in Wake County. He devised all his lands to his wife Louisa Jane House, for life; then to his children in the manner set forth in Item Five of his will, which reads as follows:

"ITEM FIVE:—At the death of my wife, the land hereinafter described of which I may die seized and possessed, shall be divided among my living children, and if one of them is dead, leaving children then these children shall have the share of their parent. My daughters, to-wit: Dorcas Anne Ceily, wife of Wade Ceily, Martha Virginia Paschal, wife of Edward Paschal, Otelia Sunshine Ferrell, wife of Walter Ferrell, at the death of their mother shall have their shares of the land herein bounded and described in fee simple forever. My sons, to-wit: Nimfus Green, Ezra Lyman and Harper Hillman shall each have their share of the land in fee simple forever. And if either one of my daughters shall die without issue, their share of the land shall be equally divided among these three of my sons (sic).

"My daughter, Meta Mason Straughan, wife of Elias Straughan, shall have use of the land hereinafter given to her, and all the rents and profits arising therefrom, so long as she may live, and at her death, the same shall be equally divided among her children and held by them in fee simple forever."

Item Seven of the will describes by metes and bounds the lands devised to each of the devisees; a tract of 41⅓ acres having been devised to Martha Virginia Paschal.

The life tenant is dead, and upon her death the devisees named in Item Five, went into possession of the respective tracts of land designated for them in Item Seven of the will.

Martha Virginia Paschal died intestate and without issue, in June, 1948.

This cause came on for hearing below, and his Honor held that the devise to Martha Virginia Paschal in fee, was not absolute, but defeasible upon her death without issue, and that upon her death without issue, the title to the said 41⅓ acres of land became vested in Nymphus Green House, Ezra Lyman House and Harper Hillman House, as provided in said will.

The interveners excepted to this ruling and appealed, assigning error.

Douglass & McMillan, Bickett & Banks, and Robert L. McMillan, Jr., for appellee.

Brassfield & Maupin for appellants.

DENNY, J. The paramount aim in the interpretation of a will is to ascertain, if possible, the intent of the testator, considering the instrument as a whole, and to give effect to such intent, unless contrary to some rule of law or at variance with public policy. *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Culbreth v. Caison,* 220 N.C. 717, 18 S.E. 2d 136; *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356. And, it is permissible, in order to effectuate or ascertain a testator's intention, for the Court to transpose words, phrases, or clauses. *Williams v. Rand, supra; Heyer v. Bulluck, supra; Washburn v. Biggerstaff,* 195 N.C. 624, 143 S.E. 210; *Gordon v. Ehringhaus,* 190 N.C. 147, 129 S.E. 187; *Crouse v. Barham,* 174 N.C. 460, 93 S.E. 979; *Baker v. Pender,* 50 N.C. 351.

Also, generally speaking, when a will is sufficiently ambiguous to permit construction, the courts favor the early vesting of estates, and the first taker of an estate by will is ordinarily to be considered as the primary object of the testator's bounty. *Weil v. Weil,* 212 N.C. 764, 194 S.E. 462; *Westfeldt v. Reynolds,* 191 N.C. 802, 133 S.E. 168; *Goode v. Hearne,* 180 N.C. 475, 105 S.E. 5; *Bank v. Murray,* 175 N.C. 62, 94 S.E. 665; *Whitfield v. Douglas,* 175 N.C. 46, 94 S.E. 667.

The real question, therefore, submitted for our decision on this appeal, is simply this: Did the testator devise to his daughter, Martha Virginia Paschal, an estate in fee simple, or a defeasible fee?

The appellants contend that it was the intent of the devisor to devise the lands described by metes and bounds in Item Seven of his will, in fee simple to his three daughters, Dorcas Anne Sealey, wife of Wade Sealey, Martha Virginia Paschal, wife of Edward Paschal, and Otelia Sunshine Ferrell, wife of Walter Ferrell, should they survive their mother, the life tenant; and, that it was only in the event of the death of either one or more of the designated daughters without issue, prior to the death of the life tenant, that the testator intended for the share of such deceased daughter to be equally divided among the three sons, citing *Whitley v. McIver,* 220 N.C. 435, 17 S.E. 2d 457.

On the other hand, the appellees contend that the "dying without issue" is referable to the death of the first taker of the fee and not to the death of the life tenant. G.S. 41-4; *Patterson v. McCormick,* 177 N.C. 448, 99 S.E. 401; *Rees v. Williams,* 165 N.C. 201, 81 S.E. 286; *Perrett v. Bird,* 152 N.C. 220, 67 S.E. 507; *Dawson v. Ennett,* 151 N.C. 543, 66 S.E. 566; *Williams v. Lewis,* 100 N.C. 142, 5 S.E. 435; *Galloway v. Carter,* 100 N.C. 111, 5 S.E. 4; *Buchanan v. Buchanan,* 99 N.C. 308.

This appeal turns largely upon the construction given as to the time the testator intended these words in Item Five of his will, to be applicable: "And if either one of my daughters shall die without issue, their

share of the land shall be equally divided among these three of my sons." In the absence of a plainly expressed intention to the contrary, appearing in the will, the above words must be construed in the light of the Act of 1827, now G.S. 41-4, which reads as follows: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight."

Many of our early decisions, decided before the Act of 1827, now G.S. 41-4, as well as later cases construing deeds and wills executed prior to its enactment, support the contention of the appellants. See *Rice v. Saterwhite,* 21 N.C. 69; *Brown v. Brown,* 25 N.C. 134; *Hilliard v. Kearney,* 45 N.C. 221; *Gibson v. Gibson,* 49 N.C. 425, and other cases cited and discussed by *Clark, C. J.,* in *Patterson v. McCormick, supra.*

In this latter case the testator devised the property in question to his mother for life and disposed of the fee in the following language: "After the death of my mother I will and bequeath the plantation above mentioned to my nephews, John D. and Clem Jowers, to be divided equally between them. In case they or either of them die without issue, it is my will that the property herein bequeathed shall go to the heirs of Archibald and Gilbert Patterson and to the surviving brother John D. or Clem Jowers, as the case may be, to be equally divided between them." The life tenant died and the nephews went into possession of the property. Thereafter, John D. died without leaving issue surviving him. Therefore, the facts raised the identical question of construction that is presented on this appeal; and the heirs of John D. Jowers took the position that since he survived the life tenant, he took the property in fee simple; but the Court held otherwise, and said: "The act of 1827 has been construed by this Court at least twenty-six times, beginning with *Tillman v. Sinclair,* 23 N.C. 183 (decided in 1840), and ending with *Kirkman v. Smith,* 175 N.C. 579, and in every case in which it has come before the Court for construction it has uniformly been held that 'Dying without heirs or issue,' upon which a limitation over takes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period,"

citing the twenty-six cases. See also these additional cases, which are in accord with the above opinion: *Ex parte Rees,* 180 N.C. 192, 104 S.E. 358; *Willis v. Trust Co.,* 183 N.C. 267, 111 S.E. 163; *Ziegler v. Love,* 185 N.C. 40, 115 S.E. 824; *Vinson v. Gardner,* 185 N.C. 193, 116 S.E. 412; *Amer. Yarn Co. v. Dewstoe,* 192 N.C. 121, 133 S.E. 407; *Henderson v. Power Co.,* 200 N.C. 443, 157 S.E. 425; *Turpin v. Jarrett,* 226 N.C. 135, 37 S.E. 2d 124.

In the case of *Rees v. Williams, supra,* the testatrix devised to her daughter, Jennie Lee, a house and lot. If she had added nothing further, the devise would have been in fee simple. However, in another item of her will, she inserted this language: "In case my daughter Jennie Lee shall die leaving issue surviving her, then to such issue and their heirs forever; but if my said daughter Jennie Lee shall die without issue surviving her, then I desire said property to return to my eldest daughter, May Lee Schlesinger, and to my son, Harry Lee, to be equally divided between them, or to their heirs, share and share alike." On the appeal it was insisted that the dying of Jennie Lee without issue surviving was intended to mean "dying without issue surviving in the lifetime of her mother, the testatrix." The Court cited with approval the following statement from 1 Underhill on Wills, Sec. 348: "The rule which construes death without issue to mean death without issue prior to that of the testator is not favored by the courts. . . . In such a case, particularly where at the date of the execution of the will any of the primary devisees are unmarried, it may be fairly presumed that the testator had in contemplation a future marriage and birth of issue, and that, intending to keep the property in his family, he meant a death without issue to take place after his death. If, therefore, the primary devisees survive him, they take an estate in fee which is defeasible by their subsequent death without issue." The Court said further, in connection with the contention that "dying without issue" meant "dying without issue in the lifetime of the testatrix": "In order to sustain such construction, we must interpolate words by adding to those in the will, that is 'dying with or without issue' the following, 'in my lifetime,' instead of adopting the natural meaning, which her own language conveys and which does not so limit the devise."

Also, in *Galloway v. Carter, supra,* the testator devised to his wife certain lands for life and then devised separate tracts of land in fee simple to each of his four sons and three daughters. Thereafter, he inserted the following: "My will further is, that if any, or either of my children, should die without leaving issue at his, or their death, the share or shares of him, or them, so dying (as well the accruing as the original share), shall be, go over and remain to the surviving brothers and sisters, and the child or children of such of them as may be then dead, equally to

be divided between them, share and share alike; but the children of my deceased child shall, in such case, represent their parents, respectively, and take in families." One of the daughters died without leaving issue. It was contended that the testator intended that "dying without issue" should have application and operative effect only in case one or more of his children died in his lifetime, after the execution of his will; and that his daughter Mary, having survived him, took her devise in fee simple. The Court did not concur in this contention, but said: "It will be observed, that the testator first makes provision for his wife, and then for his children, severally, and in order, giving each in severalty, certain lands in fee, besides slaves and other personal property. . . . Now, in our judgement, the testator of the will under consideration, intended . . . to render the estate and title of the property devised and bequeathed to his several children, defeasible, and to provide that, in case anyone or more of them should die at any time after the death of the testator, without leaving issue living, at his, her or their death, respectively, the property so devised and bequeathed including any that might have accrued under the clause, should at once, upon his, her or their deaths respectively, at any time, go over to, and become the property of, the surviving brothers and sisters, and the child or children of such of them as may then be dead, equally to be divided among them, share and share alike, the children of any deceased child representing their parents respectively, and taking as families."

And in the case of *Buchanan v. Buchanan, supra,* the testator devised to his son Richmond all the remaining part of his property not otherwise disposed of in his will, but added, "should Richmond die without bodily heir, it is my will and desire that my son Andrew should have it all." Richmond died after the death of Andrew, and without issue. It was contended that since Richmond survived the testator, he took a fee simple title to the devised lands. The Court, as in the case of *Galloway v. Carter, supra,* did not sustain the contention, but said: "Unless, then, the gift be to two tenants in common, with a clause of survivorship, which, for the forcible reasons given in *Hilliard v. Kearney,* confines the limitation over to a death occurring in the testator's lifetime; or there is an intent apparent in the will or inferable from its other provisions, to restrict the contingent event to the testator's life, we see no sufficient reasons for qualifying the words 'dying without issue,' by adding what he does not say, that the 'dying' must be before he dies himself. . . . The testator, in the will before us, limits the property to one son upon the death of the other without issue, and with no other qualifying restrictions. How then, by construction, can such a restriction as requires the death to occur before the death of the testator be introduced into the clause and it be made to speak what the testator has not said?"

Now, let us examine the will of the testator in the light of G.S. 41-4, and the cited cases. All the land involved was devised to his wife for life. Then he said, "At the death of my wife, the land hereinafter described of which I may die seized and possessed, shall be divided among my living children, and if one of them is dead, leaving children then their children shall have the share of their parent."

In Item Six of the will the testator said, "I have had all my land except the lots in Knightdale . . . mapped and platted by . . . County Surveyor, which map I have caused to be recorded in the Book of Maps in Wake County, and for the description and boundaries of the land herein devised, I make and constitute this map a part of this my last will and testament."

In the Eighth Item of his will, the testator devised the lots in Knightdale to his sons, Nymphus Green House, Ezra Lyman House, and Harper Hillman House, in fee simple, with a further statement that "they may divide said lots equally among themselves or, if they desire, they may sell said lots to the highest bidder or at private sale and divide the money equally among themselves."

The testator divided his other land among his nine living children and set out each tract in Item Seven of his will, and follows the description of each tract with the following statement: "I give this tract of land to my (naming a son or daughter) as provided in Item Five as hereinbefore set out."

An examination of Item Five of the will discloses that the only part thereof that refers to all nine of his living children is the first sentence therein. It appears from the will that four of the testator's five daughters were married at the time of its execution, and that one son, James Rufus House, and the one unmarried daughter, now Mrs. Louis Estelle Richards, wife of D. E. Richards, were not mentioned by name in Item Five of the will.

Therefore, if we adopt the appellants' view in this case, we must find that the testator intended to make the fee defeasible only during the life of the life tenant, and then only as to his daughters. In this connection, it is important to note that the question of survivorship is not involved in the respective devises contained in Item Seven and the first part of Item Five of the will. The land is not devised to his nine children as tenants in common, to be divided among those surviving at the death of the testator or the life tenant. The land was divided by the testator, described by metes and bounds, and eight of his nine children were given his or her share in severalty, and in fee simple, subject only to the life estate of the testator's widow. The other one was given a life estate with remainder to her children. Then he proceeded to insert the controversial part of his will: "My daughters, to wit: Dorcas Anne Sealey, wife of

Wade Sealey, Martha Virginia Paschal, wife of Edward Paschal, Otelia Sunshine Ferrell, wife of Walter Ferrell, on the death of their mother shall have their shares of the land herein bounded and described in fee simple forever"; and added a similar statement as to three of his sons. He then added the following sentence: "And if either one of my daughters shall die without issue, their share of the land shall be equally divided among these three sons." It would seem reasonable to infer from the testator's will as a whole, that it was his intent to give the three daughters named above, as well as his unmarried daughter, a fee simple title forever, unless they died without issue. But we think it is equally clear that he intended the fee to be defeasible upon the death of any or either of these daughters, without issue, regardless of the time of their death. Moreover, we think the language used in connection with the death of the wife is significant. "At the death of my wife, the land . . . shall be divided among my living children, *and if one is dead,* leaving children then these children shall have the share of their parent." But he did not say, *"if one of them is dead without children,* their share shall go to thus and so." But, on the contrary, after reaffirming the character of the estate devised to six of his nine children, which he intended for them to have and possess at the death of their mother, he then added, "And if either one of my daughters (which would include all five of his daughters) shall die without issue, their share of the land shall be equally divided among these three of my sons." We think it is clear that the testator intended that none of his daughters should have an indefeasible fee in the devised property. Apparently he intended to keep the devised tracts of land in his family. *Rees v. Williams, supra.* For it is apparent that one daughter had children at the time of the execution of the will, and the testator limited her estate to one for life and devised the remainder to her children.

Furthermore, it was provided in Item Seven of the will, that if the husband of Martha Virginia Paschal, did not make full settlement with the testator of all their business transactions before his death, then the devise to her would be null and void; and her share was to be sold and divided among all his children.

Doubtless the testator felt that the discrimination made against his five daughters, in favor of three of his sons, might result in litigation. Therefore, about two years after the execution of his will, he added a codicil, as follows: "If one or more of the devisees under my will above mentioned, shall bring suit to break and set aside my last will and testament, or any portion thereof, I revoke any gift and devise which I may have made to such devisee or devisees in my said last will and testament, and direct that such devisee or devisees shall not take anything whatsoever under my said last will and testament, and the same shall be equally

divided among those devisees who do not bring suit to break and set aside my said last will and testament."

Construing the will as a whole, in light of the provisions of G.S. 41-4 and the cited authorities, leads us to the conclusion that Martha Virginia Paschal took the property in controversy, in fee, defeasible upon her dying without issue before or after the death of the life tenant, and we so hold. *Henderson v. Power Co., supra; Patterson v. McCormick, supra; Kirkman v. Smith,* 175 N.C. 579, 96 S.E. 51; *Rees v. Williams, supra; Perrett v. Bird, supra; Harrell v. Hagan,* 147 N.C. 111, 60 S.E. 909; *Buchanan v. Buchanan, supra.*

The case of *Whitley v. McIver, supra,* upon which the appellants are relying, presented a different factual situation. No intermediate estate was created or an estate by way of remainder or executory devise, but the limitation over was by way of substitution. Therefore it was held, and properly so, that the "vesting in any event was to take effect and become absolute at the death of the testatrix."

The judgment of the Court below is

Affirmed.

BARNHILL, J., dissenting: The majority conclude that the judgment entered in the court below should be affirmed. In this conclusion I am unable to concur. As the correct application of cardinal rules of construction of wills is involved, I feel compelled to express my views on the question presented. This may not be done intelligently except at the expense of repetition of matters contained in the majority opinion.

Thomas Wesley House died testate, seized and possessed of certain land in Wake County. He had five daughters and four sons who survived him. One daughter, Martha Virginia Paschal, survived the testator and his widow, the life tenant, but died without issue in June, 1948. Who now owns her share in the estate is the question involved.

Item Five of the will, which is the battleground of the controversy, is quoted in the majority opinion.

The one real determinative question posed by the appeal is this: Does the last sentence of the first paragraph of Item Five, to wit, "And if either one of my daughters shall die without issue, their share of the land shall be equally divided among these three of my sons," provide and describe alternate devisees who shall answer at the roll call in the event one of the daughters is then dead and without issue, or does it limit the estate devised to the daughters?

If it limits the estate devised, then the majority conclusion is correct. But I adhere to the view that it is a part and parcel of the description of the ultimate takers. It provides a condition or contingency attached to the right to answer when the roll is called. If the majority are correct,

then we write out of the will and render utterly meaningless the provision therein that the three named daughters "shall have their shares of the land . . . in fee simple forever." If my construction of the language used is sound, then this provision is given full force and effect. Every word is accorded its ordinary meaning and no part is rejected. *Williams v. Rand,* 223 N.C. 734.

What did the testator intend? The dominant purpose in the interpretation of a will is to discover this intent and give it effect unless it runs counter to some established rule of law or is at variance with public policy. *Schaeffer v. Haseltine,* 228 N.C. 484; *Smith v. Mears,* 218 N.C. 193, and cases cited.

In ascertaining this intent, no word ought to be rejected if any meaning can possibly be put upon it. *Schaeffer v. Haseltine, supra; Bank v. Corl,* 225 N.C. 96; *Holland v. Smith,* 224 N.C. 255. Apparently repugnant clauses should be reconciled and effect given, where possible, to every clause, phrase, and word. *Williams v. Rand, supra.*

In order to ascertain and effectuate the intent of the testator or reconcile or eliminate apparently inconsistent or repugnant provisions, it is permissible for the Court to transpose words, phrases, or clauses of the will. *Heyer v. Bulluck,* 210 N.C. 321; *Williams v. Rand, supra.*

Applying these cardinal principles of construction in seeking the intent of the testator as expressed in Item Five of his will, every word, phrase, and clause thereof may be given full force and effect, consistent with every other part of the will.

It is apparent that to ascertain who shall take as remaindermen the roll must be called at the death of the life tenant. "When the gift to the survivors is preceded by a particular estate for life or years, words of survivorship, in the absence of anything indicating a contrary intention usually refer to the termination of the particular estate." The period of division is the death of the tenant for life. *Jessup v. Nixon,* 193 N.C. 640; *Whitley v. McIver,* 220 N.C. 435; *Bradshaw v. Stansberry,* 164 N.C. 356; *Mercer v. Downs,* 191 N.C. 203.

In seeking the intent of the testator, it must be noted that the crucial sentence relates to all five daughters—not merely to the three who are to take their shares in fee. The sentence, therefore, is not couched in terms to indicate the testator was referring to the fee estate devised to the three named daughters, but to those who should answer at the roll call in the event any one of his daughters was then dead without issue surviving.

While the testator desired his real property to go to his five daughters and four sons, he knew that all of them might not be living when the roll was called. He made provision against this contingency. His property was to be divided, at the death of his widow, among his living children. If any child should die before the roll call, leaving children, then

the children should answer and take their parent's share. If any one of his daughters should then be dead and without issue, the three named sons should answer in her stead and take her share. One daughter, Meta Mason Straughan, should take only a life estate, with remainder to her children.

It has been suggested, however, that no provision was made against the contingency that a son might die without issue and therefore the last sentence in the first paragraph of Item Five may not be deemed a description of devisees. But this is not the case. Survival was the condition on which the right of the sons depended.

Thus, in my opinion, Item Five of the will should be construed to read in this manner: "At the death of my wife, the land hereinafter described of which I may die seized and possessed, shall be divided among my living children, and if one or more of them is dead, leaving children, then these children shall have the share of their parent. If any one of my daughters shall be dead and without issue, their share of the land shall be equally divided among my sons, Nimfus Green, Ezra Lyman, and Harper Hillman. My daughters, Dorcas Anne, Martha Virginia, and Otelia Sunshine, and my sons, Nimfus Green, Ezra Lyman, and Harper Hillman, shall have their shares of the land herein bounded and described in fee simple forever. My daughter Meta Mason Straughan shall have a life estate with remainder over to her children in fee simple."

As so construed, every part of the will harmonizes; every word and phrase is given force and effect. The presumption in favor of the first taker prevails, *Smith v. Creech,* 186 N.C. 187, *Dunn v. Hines,* 164 N.C. 113, and the express provisions of the statute, G.S. 31-38, are observed. *Smith v. Creech, supra.*

If the last sentence in the first paragraph of Item Five is construed to limit the estate devised, such construction not only nullifies a pertinent and material provision of the will and has the testator declaring that he desires his daughters to hold their estate in fee and in the next breath limiting that very estate to a defeasible fee, but also converts every devise, save one, into a defeasible fee.

Rejection of any part of the will is the last resort and it must be imperative. *Rees v. Williams,* 165 N.C. 201.

Why should the testator be so careful to define the quality of the estate devised to these three daughters if he did not mean it? If he meant it, then why should we not adopt that reasonable construction of the will which effectuates that intent? Martha Virginia Paschal was living when the roll was called. She took her share in fee. The contingency, upon the happening of which the three sons were to answer in her stead, never occurred. They, as devisees, took no part of her share.

It cannot be said that the testator, by the contested provision, was seeking to keep his land in his own line of descent, for if a daughter should die without issue, her husband, if any, would take nothing. The land, in any event, would descend to her brothers and sisters or their lineal descendants.

The codicil provision against any contest of the will was not aimed exclusively at the daughters. It applies to all devisees alike.

If we accept the premise that the crucial sentence in Item Five necessarily qualifies the estate devised to the three daughters, then the cases cited in the majority opinion are pertinent and controlling. As I cannot accept that premise as the basis of decision, they, in my opinion, have no bearing on the question presented.

Therefore, for the reasons stated, I vote to reverse.

STATE v. N. L. CARPENTER.

(Filed 14 December, 1949.)

1. Convicts § 2: Public Officers § 7a—

The fact that disciplinary punishment inflicted on a prisoner by a prison official is administered in accordance with the rules and regulations of the State Highway and Public Works Commission does not render the prison official immune to prosecution for assault unless the particular regulation relied on is within the statutory authority of the Commission. G.S. 148-11, G.S. 148-20. The statute conferring authority to promulgate such rules and regulations is constitutional.

2. Same—

A prison official is not immune from prosecution for assault in administering disciplinary punishment to a prisoner even though the mode of punishment be specified in valid regulations if in the manner of applying the punishment and the extent to which it is carried the punishment is unreasonable.

3. Same—

Evidence in this prosecution of a prison official for assault that upon direction of defendant a prisoner was handcuffed to bars so that he could not assume a sitting or reclining position for a period of 50 to 60 hours, without food, with rest periods of 15 minutes every five hours, with further evidence by the prisoner that he was not always given the rest periods as prescribed, *is held* sufficient to overrule demurrer to the evidence.

4. Indictment and Warrant § 15: Courts § 4b—

On appeal to the Superior Court from a county court upon conviction for assault, the Superior Court has power to allow an amendment of the

warrant by the addition of the words "inflicting serious injury" provided the charge as amended is within the jurisdiction of the county court (G.S. 7-405; G.S. 7-435; G.S. 7-149, Rule 12), since the amendment does not change the offense with which the defendant was charged.

5. Criminal Law § 53b—

An instruction to the effect that only in the event the jury should not believe the testimony of defendant beyond a reasonable doubt should the jury return a verdict of not guilty, must be held for reversible error even though the defendant as a witness in his own behalf may have made admissions which would have to be discounted before an acquittal could be had.

DEFENDANT'S appeal from *Sharp, Special Judge,* Regular July 1949 Criminal Term, RICHMOND Superior Court.

The defendant-appellant was tried in the Special County Court of Richmond County on a warrant charging him as follows:

> "C. H. Holland on Inf. & Belief, being duly sworn, complains and says that at and in said County of Richmond, Rockingham Township, on or about 11 Aug. 1948 & at various other times in past 12 mts. N. L. Carpenter did unlawfully, willfully, and feloniously assault and hang Clarence Lett by his arms on the wall for seventy (70) hours in the N. C. Prison Camp #607 and did inflict cruel and unusual punishment upon him, contrary to the form of the statute and against the peace and dignity of the State."

He was convicted in that court and appealed to the Superior Court of Richmond County. When the case was called in the Superior Court and before the jury was impaneled, or entry of a plea, the defendant moved to quash the warrant and dismiss the case (a) because he had been tried in the lower court and found guilty of "cruel and unusual punishment," and there was no such crime; and (b) that the lower court did not have jurisdiction and since the jurisdiction of the Superior Court was derivative, the case should be dismissed.

The court denied this motion and defendant excepted. Thereupon the Solicitor moved to strike out the words "cruel and unusual punishment upon him," and insert in lieu thereof, "serious and painful injuries upon the person of Clarence Lett," so that the warrant should read, after the amendment, "did unlawfully, willfully, and feloniously assault and hang Clarence Lett by his arms on the wall for seventy (70) hours in the N. C. Prison Camp No. 607 and did inflict serious and painful injuries upon the person of Clarence Lett." Defendant objected to the amendment as changing the nature of the crime. The amendment was allowed and defendant excepted.

Clarence Lett, the prisoner upon whom the assault was alleged to have been made, testified in substance as follows:

The witness was in August, 1948, and several months previously, serving time as a prisoner in the prison camp in Richmond, a term of 18 months for a misdemeanor. Carpenter was Superintendent of the prison camp at the time he was there. Some time in August, 1948, a punishment was administered to the witness by Mr. Carpenter. The witness and other prisoners were working on the highway and ditching along the road and a beer truck came along, and the witness said, "I would like to have me a case of beer," and one of the prisoners said, "Budweiser is what you need—makes you wiser,"—"and the guards loaded us up and carried us in and hung us up for it. Captain Carpenter had me hung up."

Sometime in the first of the spring Carpenter came through the mess hall of the prison camp and stated that he was making new rules and that if prisoners were caught talking on the road they were going to be hung up and punished for it. The conversation happened after he had been told that. They were carried into camp after the beer truck passed by.

The witness saw Mr. Carpenter the afternoon on which they were brought in. He came in there after Capt. Meeks had already hung the witness and others up and talked to another prisoner and hung him up. It was all for the same thing.

By being "hung up" the witness stated that "you had to stand with your hands out before you, when they were handcuffed to the bar." Standing, the hands were about even with the chest. "The bars we were handcuffed to are about like these over here in jail—regular cell bars. They are round, little ridge running down each side. They are far enough apart for you to get your arms through all the way. The handcuffs were strapped around my wrists. There was one bar between my arms. There are cross-bars to these (cell) bars. This cross-bar is a sheet of steel"—(about a thickness of a few inches)—"that runs across the bars about waist high from the floor. That's the highest bar under my arms."

"My wrists were handcuffed on the other side of the bars and I was left standing there for a certain period of time with my feet on the floor. I could take the weight of my body off my feet by pressing my arms on the cross-bar, but how long could I stand there with it on my arms? I stood there from Wednesday to Saturday and went to work Saturday morning. I worked every day after I was taken down. I could get my arms through the bars up to my elbows. I could get my elbows through the bars. I could get almost to my shoulders through the bars,—could get as far as my head and the rest of my body would let me. My arms could get through the bars until my entire body was resting against the bars but that wouldn't have anything to do with my feet. My feet did not leave

the floor at any time. I was not suspended at any time so that my feet were above the floor."

"I went to work on Saturday morning when the squad went out, about 7:00. I was not given any breakfast before I left. I was not released from the bars Friday night; me and Whitey Williams stood up there until Saturday morning. I was not released around eight o'clock Friday night. I did not sleep in my bunk all Friday night until I was awakened the next morning, when I was released from the cuffed position he just uncuffed me and I got my water and walked around for 15 minutes. The night watchman lets us down and sometimes Cap'n. Meeks. There are four or five different night watchmen. Cap'n. Arnett was one of them in August. He was the one that released me on Thursday at night.

"I went to work on Saturday and worked as long as any of the rest of the squad. We got in camp at 12:00. I did not make any complaint about swollen legs or feeling bad to the guards or foremen. Mr. Carpenter never put his hands on me when I was cuffed to the bars; he come through there one day and I had my foot set up on the bank and he told me if I didn't get it down he would slap it down. He did not put his hands on me at any time."

"Nobody took the trouble to examine my feet. My legs were swollen up after I was taken down two or three days. I was brought in from work on this Wednesday about three o'clock and immediately hung up right after we come in. This was the same day that the talking out on the highway took place."

Carl Holland, a witness for the State, testified that he was Sheriff of Richmond County and that he had investigated the alleged assault at the Richmond County prison camp. He had a conversation with Carpenter with respect to Lett,—the punishment administered to him. Carpenter carried him out into the cells and showed him how the punishment was administered. While talking about the indictments which had been brought against Meeks and Carpenter, Carpenter stated that Meeks had nothing to do with it; that Meeks administered the punishment under his direction.

This witness stated that he exhibited to him the prisoner at that time handcuffed to the bars; that he was in a crouched position, partially on his legs and knees.

Carpenter said that the punishment was not administered in the presence of a doctor; that he did not have a doctor unless he thought it was necessary. The floor was a cement floor.

At the close of the State's evidence the defendant demurred thereto and moved for judgment as of nonsuit, which was denied, and defendant excepted.

The defendant offered in evidence an authenticated copy of the "Rules and Regulations Governing the Management of Prisoners under the Control of the State Highway and Public Works Commission," and these were received as evidence and identified as defendant's Exhibit A. Excerpts therefrom are quoted *infra.*

The defendant Carpenter testified that he was at the time mentioned employed by the State Highway & Public Works Commission, and was now so employed, in the capacity of superintendent and manager of prisoners in the Richmond County prison camp. That he was responsible for the conduct and keep of the prisoners at the camp and employed the prison guards; and had the responsibility for disciplining of prisoners. He testified that on August 11, 1948, he had occasion to impose disciplinary punishment on Clarence Lett; that Clarence Lett was assigned to the road gang working on the highway under the supervision of guards and State maintenance foremen. The prisoner Lett was sent to the camp by the guard; he was sent in at 20 minutes to 4:00 o'clock on Wednesday, August 12. As a result of the report from the guard, the witness gave orders to his steward to handcuff Lett to the bars. Witness introduced the report that he had made with reference to the incident, which report was entitled, "Grade Demotion and Punishment Report," and shows that the punishment was for "unsatisfactory work and disorderly conduct on the roads," and contained the punishment recommended with grade demotion. Witness' recommendation was "48 to 60 hours and demote to C. Grade." Below the report there was a printed form for grade demotion and the statement, "Handcuffed to bars 30 to 60 hours without food, but plenty of water. Give the prisoners a fifteen minute rest period each five hours and do not handcuff the arms above the waistline."

The witness stated that he was not present when Lett was handcuffed and did not see him; did not touch him; did not release him at any time but gave instructions to release him periodically. The witness further testified that he had given instructions to the night guards Arnett and Miles to release the prisoner every five hours for 15 minutes. The witness stated that he had seen Clarence Lett occasionally during the period he was handcuffed to the bars; that he had walked in in the morning and checked to see that all the prisoners were out of the cells and had to walk right by him. He did not recall how he was standing when he saw him.

Carpenter testified that he gave instructions to handcuff the prisoner to the bars at the time he came in at 20 minutes to four and to be "let down" at 8:00 o'clock Friday night; did see the prisoner when he was checked out to work at 7:00 o'clock Saturday morning; at 6:50 o'clock. Saw him coming out and getting into line with the rest of the road gang.

The witness testified that respecting "Rules and Regulations Governing the Management of Prisoners" that he ran his camp by that book. "I

mean on the discipline. The book is mailed to us from Raleigh. Copies of that book I distributed among the prisoners in the cell."

On cross-examination the witness stated that in response to the report "I had when he was sent in, I had him handcuffed to the bars within 30 or 40 minutes after he was sent into the camp. Our rules and regulations say: 'Handcuff and require to remain in standing or sitting position for a reasonable period of time; period of punishment to be approved by the disciplinarian.'" Witness stated that he got the approval on Saturday after the prisoner was down. "Our rule says that the man in Raleigh, who is the disciplinarian, is supposed to tell us how long we can hold a man up there. I didn't get any such permission on this occasion. I don't know why I got a report dated on the 14th from Raleigh after the man had already been sentenced and hung up and cut down. I am just superintendent of the camp. As superintendent I am supposed to know how to run it."

The following interchange of question and answer took place:

"Q. So you didn't have any authority at the time this man was hung up there to hang him for one hour?

"A. Only the custom of the Prison Department. It is not a written rule. It is instructions we get.

"Q. As a matter of fact, these rules and regulations you are talking about you don't pay any attention to them at all, do you? You go by custom?

"A. In that particular case we have to.

"Q. This report Mr. Peters showed you and you read—what is the date up there at the top?

"A. I didn't read that report. That is a different report.

"Q. This is dated down here August 14th. This is the one?

"A. Yes, sir.

"Q. And the man was hung up August 11th?

"A. Yes, sir.

"Q. And you say now that is done by custom and not by written rule? That correct?

"A. That is the instructions I got.

"Q. Who did you get instructions from to that effect?

"A. It starts down the line from the supervisors on.

"Q. Who instructed you to disregard the rules and regulations of the Prison Department and act on some custom?

"A. The supervisor on down to the director.

"Q. 'Period of punishment to be approved by the disciplinarian'—Now, what does that mean? Mr. Carpenter, the authority that says

you can handcuff a man says you must have authority from Raleigh from the disciplinarian, as to the period of time, doesn't it?

"A. Says 'to be approved.'

"I handcuffed the boy to the bars when he came in. I did not have any authority from the disciplinarian in Raleigh telling me how long this man could be hung up, not on the 12th of August. I ordered him handcuffed. It was done under my orders. I gave instructions to take him down Friday night. I did not see him Friday night and I do not know of my own knowledge when he was taken down. The next time I saw him was in the yard Saturday morning, going to work. I did not have a doctor examine him at any time while he was up at those bars. After he was taken down the doctor came to the camp on Saturday and had the prisoners to come down if they wanted to come. He (Lett) didn't come. He was already down and had been back to work on Saturday. I did not go by to examine him to see whether he was suffering or whether his feet were swollen or anything was the matter with him. My Steward did that. I was the man in charge of the prisoners. I told the Sheriff, when Mr. Meeks was indicted, that he had nothing to do with it, that I was the man responsible. That was my opinion. I assumed full responsibility."

The witness testified that the prisoner had been released in accordance with instructions during the period of less than 60 hours.

The defendant put on certain prisoners who testified in support of defendant's claim with regard to the relief given at stated times during the period of punishment.

Owen Meeks testified that he was steward at the prison camp at the time Clarence Lett was handcuffed to the bars; that he had occasion to administer to him and let him down; that he let him down every five hours for 15 minutes at a time and then put him back to the bars; he was handcuffed to the bars Wednesday afternoon and was not taken down during that afternoon; took him down next morning, Thursday, around 7:00 o'clock. Took him down again around noon and again around five o'clock in the afternoon; saw him on Friday "and took him down the same." Witness went to work Saturday morning at 5:30; Lett had then been let down.

Kyle Matthews was offered by the defendant and testified that he was chief inspector for the Prison Department. The defendant sought to show by him what had been done with respect to minor offenses in other camps and under other superintendents. To this the State objected and the evidence was excluded. Defendant excepted. The defense also sought to show by witness Matthews what instructions he had given to the

defendant Carpenter respecting enforcement of the rules. The evidence was rejected on objection by the State, and defendant excepted. The jury was excused and in its absence the witness testified: "The only punishment they had to wait for approval of was corporal, that is, when you are going to use a leather strap. They had to get that approved by the Raleigh office before it was put into effect. That is provided by the rules. The other punishment is never required to be approved before the punishment was put in effect since I have been with the Prison Department. It is in accordance with the prison rules and regulations and in accordance with our training that superintendents administer punishment for minor offenses before they hear from the disciplinarian in Raleigh. We instructed all the superintendents that they did not have to wait to get the approval back from Raleigh to punish them—to punish a prisoner—for minor offenses, anything except corporal punishment—they had to wait for that. By that I mean, when you use the leather strap to whip one—that has to be approved by the Chief of the Highway Commission."

R. B. Finison was offered by the defense in the absence of the jury, who testified that he was superintendent of Montgomery County Prison Camp and had been for 15 years; that in punishing prisoners for minor offenses it was his custom to cuff them to the bars. "I have heard the description of cuffing to the bars as given this morning. That is the same thing that I do. I also report to Raleigh. I do not wait until I have the approval from Raleigh before I cuff prisoners to the bars because our instructions and our prison supervisors instruct us to go ahead and handcuff them to the bars and state the rules to Mr. Honeycutt, and it has always been approved."

On cross-examination he said he handcuffed prisoners to the bars in his camp and did not get the approval of the disciplinarian before he did that. "It has always been approved. Sometimes it comes in later and sometimes earlier. We write them up. When a man is brought in from the road for breaking the rules we decide on what kind of punishment he should have. Then I give it to him and at the same time I write it up and send it in to Raleigh to Mr. Honeycutt."

The witness further testified: "The disciplinarian has never failed to approve a punishment for me. I have not hung them to the bars for as long as sixty hours. I wouldn't say how long is the longest I ever had one fastened up—I never had one up that long. I would not consider that cruel and unusual punishment if he deserves it; some of them that don't have any effect on. I haven't had one up sixty hours. I have had them in the dark hole longer than that. I don't remember how long is the longest period I have had a prisoner cuffed to the bars."

S. P. Helms, superintendent of Union County Prison Camp, was offered in the absence of the jury and testified to the same effect. He stated that for minor offenses he had administered the punishment as described in the evidence and without waiting for approval of the disciplinarian. That it had always been approved. The longest that he had ever hung a man, he thought, was 60 hours.

The jury was returned and all this evidence was excluded.

From defendant's Exhibit A, that is, The Rules and Regulations Governing the Management of Prisoners under the Control of the State Highway and Public Works Commission, adopted by the Commission at its meeting of September 26, 1945, was introduced under the heading "Punishment and Discipline," the following:

> "(a) The superintendent, warden, or the officer next in authority designated by the superintendent or warden in his absence, will be permitted to administer such punishment as herein provided.
>
> "(b) For Minor Offenses: . . .
>
> "Handcuff and require to remain in standing or sitting position for a reasonable period of time. Period of punishment to be approved by Disciplinarian.
>
> "(c) For Major Offenses:
>
> "1—Reduction in grade.
>
> "2—Place the prisoner in shackles.
>
> "3—Restricted diet and solitary confinement. Period of punishment to be approved by the Disciplinarian.
>
> "4—Additional time to the minimum sentence for a prisoner serving indeterminate sentence.
>
> "5—Corporal punishment, with the approval of the Chairman of the State Highway and Public Works Commission, administered with a leather strap of the approved type and by some prison officer other than the person in immediate charge of said prisoner and only after physical examination by a competent physician and such punishment must be administered either in the presence of a prison physician or a prison chaplain."

Reprint of the other exhibits is not relevant to the decision.

At the close of all the evidence defendant renewed the motion for judgment as of nonsuit, which was denied. The defendant then moved for a directed verdict of not guilty, which was denied, and defendant excepted.

Exceptions to the Judge's charge pertinent to the decision will be found in the opinion.

The case was submitted to the jury and resulted in a verdict of guilty. The defendant moved to set the verdict aside for errors committed on the trial. The motion was denied, and defendant excepted.

To the ensuing sentence the defendant objected, excepted and appealed, assigning errors.

Attorney-General McMullan and Walter F. Brinkley, Member of Staff, for the State.

A. P. Kitchin, W. G. Pittman, R. Brookes Peters, and E. O. Brogden, Jr., for defendant, appellant.

SEAWELL, J. The rules and regulations adopted by the State Highway and Public Works Commission for the control and discipline of prisoners committed to its custody and intended for the guidance of those who have their immediate control cannot confer upon the latter immunity for disciplinary acts which would otherwise be offensive to the criminal law, unless the particular regulation, *per se,* is within the authority of the statute relied upon, and the statute itself not violative of the provisions of the Constitution. Section 148-11 of the General Statutes, on which the appellant claims authority for the disciplinary measures taken, reads as follows:

> "The state highway and public works commission may adopt such rules and regulations for enforcing discipline as their judgment may indicate, not inconsistent with the constitution and laws of the state. They shall print and post these regulations in the cells of the convicts, and the same shall be read to every convict in the state prison when received."

This statute is supplemented in appellant's brief by G.S. 148-20, reading as follows:

> "It is unlawful for the state highway and public works commission to whip or flog, or have whipped or flogged, any prisoner committed to their charge until twenty-four hours after the report of the offense or disobedience, and only then in the presence of the prison physician or prison chaplain; and no prisoner other than those of the third class as defined in this article shall be whipped or flogged at any time."

S. v. Nipper, 166 N.C. 272, 81 S.E. 164, furnishes a complete background of the law as it stands at present, (G.S. 148-20). The constitutionality of the statute (G.S. 148-11) was upheld in *S. v. Revis,* 193 N.C. 192, 136 S.E. 346, in an opinion by *Chief Justice Stacy* which touches

practically every phase of the question now before us. But to render lawful any corporal punishment directly provided for in the act or by analogy supposed to be within the authority of the rules and regulations provided for in the preceding section, G.S. 148-11, that sort of discipline must be within the rule of reason contemplated by the statute; and excessive punishment may deprive the perpetrator of its protection. *S. v. Mincher,* 172 N.C. 895, 90 S.E. 429.

It should be made clear that if the Commission has, under the supposed authority of the statute, adopted rules for discipline of prisoners by punishment or corrective measures not within its purview, the principle of regard for administrative interpretation evidenced by practice will not control; and the fact that the defendant may have supposed himself to be within the performance of a regimented duty is not a defense.

In a fair consideration of this case we must take note of the fact that prison discipline in this country has been developed in an atmosphere of sterner justice through the courts than that which now prevails, and has taken on that flavor. But during the years both the courts and the executive administration of its edicts have been greatly mollified by more modern, if not more effectual philosophy respecting crime and its punishment; and we have finally come to the point where it has become a question for the humanitarians, (and we all wishfully, at least, belong to that class), the criminologists, and experienced officials working in the field of prison control as to what manner and degree of discipline is best suited for the purposes of the criminal law, and may with propriety and observance of the humanities be applied. The passage between Scylla and Charybdis has not been free from conflicting storms of acrimonious criticism.

We certainly have not time or space in this opinion for any dissertation on the ultimate purpose of enforcing the criminal law,—whether for the punishment of the crime or the reform of the prisoner. Conceding it to be both, it is obvious, we think, that neither philosophy would be best served by permitting open rebellion or insolence, or such disobedience to the custodial will as would nullify the mandate of the Court, breed disrespect for the law and contempt for those who must enforce it.

With the Court itself which tries the accused and determines his guilt and attempts to measure the debt which he owes to society, as well as whether the debtor may, in some respects, be salvaged from his antisocial behavior, the task is more practical than theoretical. Humanitarian considerations, as far as the Court may consider them, (and there is no other phase of the judge's duty that is so difficult and usually so conscientiously faced), these are reflected in the judgment rendered, often leading to probation, many judges no doubt properly thinking the penitentiary or prison is a poor college from which to graduate the subsequent

citizen. The duty of the Court, however, ends with the judgment; and we come to the very practical question which boils up to the top of the pot in cases like these: What rights does a prisoner of the law retain when the sentence of the Court is announced and he is inducted into his new station or status; and what rights has he surrendered to society?

In the first place it is clear that his status is not expressly fixed by the judgment of the Court,—that does not reach forward and minutely detail his treatment in his new station; there is something over when the sentence is imprisonment, or imprisonment "at hard labor." Human elements are to be dealt with,—the things which custodians may or may not do to him. Some of them are necessarily implied in the sentence and incident thereto; and some of them must be in accord, to some extent, with the prevailing *mores* of the people who stand back of the law.

We observe in the first place that as a matter of conclusive inference, the prisoner has, with the temporary surrender of his corporal freedom, also parted with some of those rights and liberties that are pertinent to the free civilian in exercising his will as he may desire. The sentence to imprisonment at hard labor carries with it more than a mere willingness on the part of the prisoner to comply with these conditions. A want of willingness must be supplied by reasonable encouragement, or corrective measures. All of them are imposed upon him *in invitum;* and he has surrendered those rights of free choice and action which must of necessity be abridged in order that the mandate of the Court may be carried out effectively.

In the second place he has forfeited his free choice of conduct, of engaging in practices calculated to destroy the order and effectiveness of the institution to which he has been committed. We all agree to this.

But, in all cases where the rule of reason is the important factor or coefficient of action, there is an extensive area in which there are no sharply drawn lines leading to easy definition; instead a twilight zone, on one side of which conduct may not be challenged as other than lawful or innocent, and on the other is clearly nocuous. Even the discretionary power of the judge, ordinarily unreviewable, may come within appellate correction because of its abuse.

We cannot, therefore, accept the theory suggested by the defense that because the mode of punishment meted out to the prisoner was specified in the regulations, it was, therefore, necessarily lawful. The manner of its application as testified to by the prisoner, the extent to which it was carried, the period during which it continued, the want of attention during that time, taken in connection with the lack of food and water, and rest from a position intended to inflict discomfort, and which unreasonably protracted was calculated to produce serious injury,—we cannot say that these did not go beyond the rule of reason and render its

perpetrator liable to the law. Fifty or sixty hours of such treatment in the manner disclosed by the State's evidence might well raise the question whether the Creator has fashioned the human frame to withstand serious consequences to bone and sinew, not to mention that central nervous complex at the receiving end of pain and misery.

We express no approval of the regulation immediately concerned or the mode of its enforcement, and we think the conception of the treatment given the prisoner as not being "corporal punishment" is neither dictionary-wise nor penologically-sound. Why an *ex post facto* approval of the punishment inflicted should be required, or what effect it is supposed to accomplish does not appear. In so far as the disciplinee is concerned it is Lydford law.

It is unfortunate that the defense of the superintendent charged with the violation of the law resolves itself into a defense of the system, of the regulations and administrational practices which it is contended justify in law the excesses exemplified in the punishment inflicted on the Prisoner Lett as detailed in the State's evidence. Since these rules and regulations have been put in evidence as exculpatory of the defendant, and evidence of official character offered to show that practices similar to that with which we are now dealing are common in prison camps throughout the State, it becomes necessary for us to say that however these disclosures may be received in nonjudicial circles, we find them so inconsistent with the rule of reason contemplated in the statute and so repugnant to natural justice that we cannot regard them as conferring any immunity on the defendant in the instant case.

The original warrant on which the defendant was tried in the recorder's court charged an "assault attended with cruel and unusual punishment." In the Superior Court from which this appeal comes, the Solicitor moved to amend the warrant to have the charge read "inflicting serious injury." This was allowed over the defendant's objection and exception. Conceding that an amendment to the warrant completely changing the offense with which the defendant was charged could not be made, the nature of the amendment does not present a violation of the rule. The descriptive matter supplied is merely in aggravation of the assault. That might in certain instances have a jurisdictional bearing; but not here. The Special County Court of Richmond County was created under the general law, now G.S. 7-405, *et seq.;* and by G.S. 7-435 all criminal offenses under the grade of felonies have been declared petty misdemeanors respecting the jurisdiction of the courts. G.S. 7-435; *S. v. Shine,* 222 N.C. 237, 22 S.E. 2d 447; *S. v. Camby,* 209 N.C. 50, 182 S.E. 715; *S. v. Hyman,* 164 N.C. 411, 79 S.E. 284. The amendment, permissible in the County Court, was properly made in the Superior Court. G.S. 7-149, Rule 12;

S. v. Brown, 225 N.C. 22, 23 S.E. 2d 121; *S. v. Wilson,* 221 N.C. 365, 20 S.E. 2d 273; *S. v. Holt,* 195 N.C. 240, 141 S.E. 585.

It follows that the motion to quash the warrant and the motion for arrest of judgment are without merit. Demurrers to the evidence were properly overruled.

But we think that while the trial judge was justified in submitting the evidence to the jury, she suffered a casualty in giving to the jury the following instruction:

> "If you do not believe the evidence of the defendant beyond a reasonable doubt, then in that event only, would you return a verdict of not guilty."

The instruction is doubtless based on the theory that the defendant, as witness in his own behalf, had made such admissions as would have to be discounted, or unbelieved, before his acquittal could be had.

However this process may enter into and direct our thinking, the Court has never, we believe, approved the formula or passed favorably on an emphasis of this sort on the evidence of the defendant alone, or even the testimony of the defendant himself, as bearing so critically on the single issue verdict of guilt or innocence. The negative manner of the statement was calculated to confuse the jury on the necessity of conviction beyond a reasonable doubt on consideration of the whole evidence before they could find the accused guilty, and must be held for error.

We do not wish it understood that the Court approves all the instructions to which the appellant has directed exceptions. We do not find it necessary to enter into a maze of discussion which may not be helpful on a new trial, and do not find it necessary to decision to consider other exceptions in the record.

For the error indicated the defendant is entitled to a new trial. It is so ordered.

Error. New trial.

MRS. GERTRUDE HIGDON AND HUSBAND, E. R. HIGDON, SUING ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS OF LOTS IN THE SUBDIVISION OF MYERS PARK IN THE CITY OF CHARLOTTE, MECKLENBURG COUNTY, NORTH CAROLINA, WHO MAY COME IN AND BE MADE PARTIES PLAINTIFF IN THIS ACTION, v. BEN JAFFA AND WIFE, BLANCHE JAFFA.

(Filed 14 December, 1949.)

1. Deeds § 16b—

Where the owner of lands subdivides same and sells separate parcels with restrictions pursuant to a general plan of development, each grantee, and also each owner of a lot by *mesne* conveyances from such grantee, may

enforce the restrictions against any other owner who took title with notice of the restrictions.

2. Same—

A purchaser of land is chargeable with notice of restrictive covenants if such covenants are contained in any recorded deed or other instrument in his line of title, even though it does not appear in his immediate deed, since he is charged with notice of every fact affecting his title which an examination of his record chain of title would disclose.

3. Same—

Where the owner of land subdivides and sells same according to a general scheme for the entire tract, the fact that he develops contiguous land owned by him under a different plan does not affect the uniformity of the restrictions essential to a general scheme of development, since each is a separate, distinct and integral subdivision.

4. Same—

Where the owner of a subdivision sells each lot therein with restrictive covenants according to a general scheme of development, a further provision in its deeds to the several purchasers that nothing therein contained should impose any restrictions or easements on any land of the owner not conveyed, is rendered nugatory by its sale of every lot in the development subject to the restrictions, and the owner cannot revive such provision by the repurchase of lots theretofore sold by it under the restrictions.

5. Same—

The fact that the owner of a subdivision by stipulation in one deed retains the right to alter or close any street in the subdivision not adjacent to the lot sold and not necessary to the full enjoyment of the property conveyed can have no bearing on the uniformity of the scheme of development when it appears that the street in question is necessary to the enjoyment of the lot sold and further had been dedicated and accepted by the municipality for use as a street.

6. Same—

The fact that in addition to the restrictive covenants common to all the deeds to lots in a residential subdivision, one deed alone contains a restriction that no part of the lot "shall be used for agricultural purposes except the part set aside as service premises, which should not be nearer the street than 75 feet" *is held* not such a variation as to destroy the uniformity of the general scheme of development, it not being necessary to a general scheme of development that there be absolute uniformity in detail of the restrictions.

7. Trial § 22a—

On motion to nonsuit, plaintiff's evidence will be taken as true and he will be given advantage of every fair and legitimate inference which it raises.

8. Deeds § 16—

In this action by the owner of a lot in a residential subdivision to enjoin another owner from using his lot for business purposes, nonsuit is improp-

erly entered on plaintiff's evidence tending to show that all of the lots in the subdivision had been sold with restrictions according to a general scheme of developing the property exclusively for residential purposes and that there had not been a single violation of the restrictive covenants anywhere within the subdivision.

9. Same—

The fact that restrictive covenants in deeds to land in a subdivision are inserted by the owner to enable it to dispose of the property to better advantage does not create a mere personal right in favor of the owner, since such restrictions are devised also for the benefit of purchasers of lots in the subdivision.

10. Same—

Mere increase in traffic upon streets in a subdivision restricted solely to residential purposes does not impair the suitability of lots within the subdivision for residential purposes so as to render the restrictions unenforceable in equity.

11. Same—

The fact that an adjacent subdivision or surrounding property is used for business purposes does not alter the character of a subdivision used exclusively for residential purposes so as to justify a court of equity in relieving an owner against his restrictive covenants, and further, evidence as to changed conditions outside the development are incompetent in an action to enjoin the violation of the restrictions.

APPEAL by plaintiffs from *Patton, Special Judge,* at the May Term, 1949, of MECKLENBURG.

This is a civil action in which the plaintiffs, as owners of Lot No. 17 in Block 11-C of a certain subdivision in Myers Park in Charlotte, North Carolina, seek to enjoin the defendants from erecting or maintaining upon an adjoining lot, *i.e.,* Lot No. 16 in Block 11-C of such subdivision, "any business or commercial structure whatsoever" on the theory that applicable restrictive covenants limit the use of such adjoining lot to residential purposes.

To sustain their claim to the relief sought, the plaintiffs presented testimony of the matters and things set forth below.

On 24 June, 1924, the Stephens Company, a corporation, subdivided a tract of land in Myers Park in Charlotte, which it owned in fee, into 37 building lots, whose irregular shapes and comparatively large sizes rendered them more suitable for residential purposes than for business uses. In so doing, the Stephens Company virtually bisected the property from east to west by a passage named Henley Place, which it dedicated to public use. Such dedication was accepted by the City of Charlotte, which maintains Henley Place as one of its public streets. Henley Place intersects with three other thoroughfares, to wit, Baldwin Avenue, East

Morehead Street, and King's Drive, at the western boundary of the tract. The Stephens Company designated the 20 lots of the subdivision lying north of Henley Place as Block 11-D, and the 17 lots of the subdivision situate south of Henley Place as Block 11-C. Lot No. 16 of Block 11-C abuts upon the intersection of Baldwin Avenue, East Morehead Street, Henley Place, and King's Drive. It is bounded on the east by Lot No. 17 of Block 11-C, which fronts on Henley Place alone.

The Stephens Company caused a map of the subdivision, which it styled a "plat of Blocks 11-C and 11-D, Myers Park, Charlotte, N. C.," to be registered in the office of the Register of Deeds of Mecklenburg County, and sold all of the 37 lots in the subdivision to various grantees by recorded conveyances describing the property by reference to the recorded map.

All of the deeds from the Stephens Company to the original purchasers of the 37 lots of the subdivision prescribe in unvarying phraseology that "the property shall be used for residential purposes only"; that "nothing herein contained shall be held to impose any restrictions on or easements in any land of the Stephens Company not hereby conveyed"; and that "no apartment house shall be erected on the lot hereby conveyed." The deeds expressly state, however, that the term "apartment house" shall be construed to mean "any building designed to house more than two families." The conveyances also contain additional "covenants, conditions, and restrictions" regulating the number of residences to be erected on the lots; the building lines of residences, outbuildings, and fences; the height and cost of residences; and the height of fences. They specifically state that "no sign boards of any description shall be displayed on the property, with the exception of signs 'for rent,' which signs shall not exceed 2 x 3 feet in size."

Each deed from the Stephens Company to a purchaser expressly recites that the property therein described is conveyed subject to the specified restrictions on its use, which the parties to the instrument stipulate "shall be covenants running with the land" and which the grantee, acting "for himself, his heirs and assigns, hereby covenants and agrees to perform and abide by."

Lot No. 17 of Block 11-C was originally transferred to A. I. Henderson by the Stephens Company on 1 September, 1925, by a duly registered deed containing the restrictions on use heretofore set out, and passed to the *feme* plaintiff, Mrs. Gertrude Higdon, in 1937 under *mesne* conveyances from Henderson. The plaintiff, E. R. Higdon, unites in this action in his character as husband of the *feme* plaintiff.

The defendants, Ben Jaffa and his wife, Blanche Jaffa, deraign title to Lot No. 16 of Block 11-C under the following recorded instruments: (1) Deed from Mrs. Sophia Goodman to the defendants, dated 26 March,

1937; (2) deed from Home Real Estate and Guaranty Company to Mrs. Sophia Goodman, dated 30 October, 1930; (3) deed from G. O. Doggett to Home Real Estate and Guaranty Company, dated 6 April, 1926; and (4) deed from the Stephens Company to G. O. Doggett, dated 25 March, 1926. The deed from the Stephens Company to Doggett contains the restrictions on use heretofore described, and the deed from Doggett to Home Real Estate and Guaranty Company recited that the property is conveyed subject to the restrictive covenants set out in the deed from the Stephens Company to Doggett. The last two instruments in the chain of title of the defendants do not refer to the restrictions.

After it had sold all of the lots in the subdivision by registered deeds containing the restrictions, the Stephens Company reacquired Lots Nos. 1, 2, and 3 of Block 11-D under *mesne* conveyances from those who had formerly purchased such lots from it.

The deed from the Stephens Company to A. I. Henderson contains a restrictive covenant bearing the number 9 and reading as follows: "The Stephens Company, its successors or assigns, shall have the right to change, alter or close up any street or avenue shown upon said map not adjacent to the lot above described and not necessary to the full enjoyment by the party of the second part of the above described property, and shall retain the right and title to, and control of all streets and avenues within the boundaries of Myers Park, subject only to the rights of the party of the second part for the purposes of ingress and egress necessary to the full enjoyment of the above described property." It does not appear that this provision is in any other deed. Moreover, the deed from the Stephens Company to G. O. Doggett has an eighth restrictive covenant in these words: "No part of the property shall be used for agricultural purposes except the part set aside as service premises, which shall not be nearer any street than seventy-five feet." This clause does not appear in any of the conveyances in the plaintiffs' chain of title.

Many proprietors have erected substantial and valuable dwellings "up and down Henly Place" on lots shown on the recorded map of the subdivision. Nearly all of these structures have two stories, and most of them are of brick construction. Some are duplex or two-family houses. A few of them are rented. "There are no business properties on any of the lots shown on the map of Blocks 11-C and 11-D, only residential."

The plaintiffs have erected a substantial duplex dwelling on Lot 17 of Block 11-C. They reside in one side of it, and rent the other.

Lot No. 16 of Block 11-C is vacant. The defendants concede, however, that they are preparing to erect a store building thereon and to lease it to third persons for merchandising purposes, and that they will do so unless precluded by decree in this action.

The plaintiffs entered into two stipulations at the trial at the request of the defendants. In the first stipulation, they admit that the Stephens Company had established other subdivisions in Myers Park; that one of these other subdivisions was located just across East Morehead Street from the lot of the defendants; that the Stephens Company had sold lots in such other subdivision for commercial purposes; and that the purchasers of such lots had erected various types of business buildings thereon, and were devoting them to sundry commercial enterprises. The second stipulation recites that the increase of vehicular traffic along Baldwin Avenue, East Morehead Street, Henley Place, and King's Drive since the plaintiffs and the defendants bought their respective lots in Block 11-C of Myers Park has necessitated the installation of a traffic circle at the intersection of such streets "to slow up and regulate traffic."

Furthermore, the court allowed the defendants to cross-examine the plaintiff, E. R. Higdon, as "to conditions and changes in the territory outside of the subdivision shown on the map" of Blocks 11-C and 11-D of Myers Park. The plaintiffs reserved exceptions to the testimony elicited by such cross-examination.

After the plaintiffs had offered their evidence and rested their case, the court sustained the motion of the defendants for a compulsory nonsuit under G.S. 1-183, and entered judgment accordingly. The plaintiffs excepted and appealed, assigning the entry of the nonsuit and the admission of the evidence as to conditions and changes in the territory outside the subdivision as error.

James L. DeLaney for plaintiffs, appellants.

Charles W. Bundy, Sol Levine, and Arthur Goodman for defendants, appellees.

ERVIN, J. The primary question presented by this appeal is the propriety of the compulsory nonsuit.

It is well settled in this State that "where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual equitable easements are created." 26 C.J.S., Deeds, section 167; *Brenizer v. Stephens,* 220 N.C. 395, 17 S.E. 2d 471; *Bailey v. Jackson,* 191 N.C. 61, 131 S.E. 567; *Homes Co. v. Falls,* 184 N.C. 426, 115 S.E. 184.

Moreover, the right to enforce the restrictions in such case is not confined to immediate purchasers from the original grantor. It may be exercised by subsequent owners who acquire lots in the subdivision

covered by the general plan through *mesne* conveyances from such immediate purchasers. 14 Am. Jur., Covenants, Conditions, and Restrictions, section 319.

Furthermore, covenants limiting the use of land may be enforced against a subsequent purchaser who takes title to the land with notice of the restrictions. *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697. The law contemplates that a purchaser of land will examine each recorded deed or other instrument in his chain of title, and charges him with notice of every fact affecting his title which such an examination would disclose. In consequence, a purchaser of land is chargeable with notice of a restrictive covenant by the record itself if such covenant is contained in any recorded deed or other instrument in his line of title, even though it does not appear in his immediate deed. *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Bailey v. Jackson, supra.*

The defendants maintain with much earnestness that the nonsuit was proper on the ground that the testimony at the trial was insufficient as a matter of law to sustain the allegations of the complaint that the Stephens Company had imposed the restrictions on the use of the lots pursuant to a general plan to develop the subdivision as a restricted residential community or neighborhood. They advance several arguments to support this position.

They assert initially that the Stephens Company had developed Myers Park as a unit composed of its different subdivisions; that it had sold lots in another subdivision of Myers Park situated just across East Morehead Street from the lot of the defendants for commercial purposes; that the purchasers of such lots had erected various types of business buildings thereon, and were devoting the same to sundry commercial enterprises; and that these facts negative the claim of the plaintiffs that Blocks 11-C and 11-D, which are merely parts of Myers Park as a whole, constitute a restricted residential community or neighborhood. The defendants overlook the fact that this identical contention has been expressly rejected by this Court on at least four occasions. *McLeskey v. Heinlein,* 200 N.C. 290, 156 S.E. 489; *Johnston v. Garrett,* 190 N.C. 835, 130 S.E. 835; *Homes Co. v. Falls, supra; Stephens Co. v. Homes Co.,* 181 N.C. 335, 107 S.E. 233. The land shown on the map of Blocks 11-C and 11-D of Myers Park "is in fact, and was designed to be, a separate, distinct and integral subdivision," bearing no relationship whatever in the present field of law to any other subdivision of Myers Park. *Stephens Co. v. Homes Co., supra.*

The defendants insist secondarily that the restrictive covenants in the deeds from the Stephens Company to the original purchasers were designed to create a mere personal right in favor of the Stephens Company,

and were not intended to benefit the lots sold or those who purchased them. They say that this proposition is established by this provision appearing in all of the original deeds: "Nothing herein contained shall be held to impose any restrictions on or easements in any land of the Stephens Company not hereby conveyed." The defendants rely on *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918, in which this Court corrected an erroneous judgment rendered by the writer of this opinion while he was serving as a Superior Court Judge and by reason thereof was still subject to what *Chief Justice Bleckley* of the Supreme Court of Georgia was pleased to call "the fallibility which is inherent in all courts except those of last resort." *Broome v. Davis,* 87 Ga. 584, 586, 13 S.E. 749.

The facts in the instant action are quite different from those in *Humphrey v. Beall,* notwithstanding that most of the deeds in that case contained a stipulation like that quoted above. The grantor in the *Humphrey case, i.e.,* the Charlotte Consolidated Construction Company, retained unsold approximately 60 lots scattered throughout the 255 lots in its development, and was empowered by the clause under consideration to sell those unsold lots without restrictions. The Stephens Company, however, did not reserve any land in Blocks 11-C and 11-D of Myers Park free from the restrictions. The contrary is true. It sold every lot in the subdivision subject to restrictive covenants limiting its use to residential purposes. In so doing, the Stephens Company rendered the stipulation in question wholly nugatory. It did not revive this clause by repurchasing Lots Nos. 1, 2, and 3 of Block 11-D. This is necessarily so because its re-acquirement of those lots was under chains of title subjecting them to the restrictive covenants. *Pappas v. Eighty Hundred Realty Co.,* (Mo. App.), 138 S. W. 2d 762. Besides, each deed in the *Humphrey case* expressly provided that any restrictions upon the lot sold might be changed at any time and in any manner by the mutual written agreement of the grantor and the owner for the time being of the lot conveyed. No such vitiating stipulation appears in the deeds of the Stephens Company.

The defendants invoke the ninth restrictive covenant in the deed from the Stephens Company to A. I. Henderson, who was the plaintiffs' antecessor in title, as a refutation of the idea that the restrictions were embodied in the conveyances pursuant to a general plan to develop the subdivision as a restricted residential community or neighborhood. This argument is without convincing force. The ninth restrictive covenant in the Henderson deed has never vested in the Stephens Company any power "to change, alter, or close up" Henley Place, which is the only "street or avenue" shown on the map of Blocks 11-C and 11-D of Myers Park. This is true because Henley Place is adjacent to Lot No. 17 and is necessary to its full enjoyment. Moreover, the controversy in respect to

this particular restrictive covenant is a mere academic disquisition. The City of Charlotte accepted the dedication of Henley Place to public use as a street of the municipality, and has exclusive control over it as such.

The defendants contend finally on the present aspect of the litigation that the eighth restrictive covenant in the deed from the Stephens Company to G. O. Doggett, their predecessor in title, purports to limit the use of their lot "for agricultural purposes"; that no comparable restriction appears in the plaintiff's chain of title; and that this variation in restrictions destroys the uniformity essential to establish a general plan for the improvements of the lots in Blocks 11-C and 11-D. This argument ignores the legal principle that absolute uniformity in details is not required to establish a general plan for the development of a tract subdivided into a number of building lots. *Franklin v. Realty Co.*, 202 N.C. 212, 162 S.E. 199; *Bailey v. Jackson, supra; Snow v. Van Dam,* 291 Mass. 477, 197 N.E. 224; *Humphreys v. Ibach,* 110 N. J. Eq. 647, 160 A. 531, 85 A.L.R. 980; *Neidlinger v. New York Ass'n for Improving Condition of Poor,* 121 Misc. 276, 200 N.Y.S., 852. The mere fact that all of the restrictions are not exactly the same in all of the deeds does not prove that the restrictive covenants limiting the use of the property to residential purposes are not intended to apply to all the lots in the subdivision. 14 Am. Jur., Covenants, Conditions, and Restrictions, section 202.

In passing on the propriety of the compulsory nonsuit, we must assume that the evidence of the plaintiffs is true, and give them the advantage of every fair and legitimate inference which it raises. *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488.

When the testimony of the plaintiffs is accepted as truth, it makes out this case:

The Stephens Company subdivided Blocks 11-C and 11-D of its Myers Park property into 37 building lots so that it might sell the entire property in separate parcels to various purchasers. The shapes and sizes of the lots rendered them more suitable to residential purposes than to business uses. The Stephens Company sold all of the 37 lots to various grantees by deeds containing covenants that the different grantees and their respective heirs and assigns should use the lots "for residential purposes only." The defendants and all other present proprietors of property within the subdivision took title to their respective lots with notice of the restrictions. This is necessarily so for all of them acquired their lands under recorded chains of title containing deeds embodying the restrictive covenants. Many of the owners of lots in Blocks 11-C and 11-D have erected substantial and valuable dwellings upon their holdings. There has not been a single violation of the restrictive covenants anywhere within the subdivision. The erection of duplex houses and the renting

of dwellings within the subdivision do not constitute violations of the covenants for the deeds permit these acts.

These facts fairly and legitimately warrant these inferences:

It cannot be gainsaid that the restrictive covenants were put in the deeds to enable the Stephens Company to dispose of its property to its greatest advantage. But this does not show that the restrictions were designed to create a mere personal right in favor of the Stephens Company, and were not intended to benefit the lots sold and those who bought them. The reverse is, indeed, the case. The object of the Stephens Company to sell its land to its greatest advantage was effected only because its representations as to the restrictions convinced the purchasers of the several lots that the observance of the restrictions within the borders of the subdivision would enhance the value of the lots which they purchased. This being so, the restrictions were devised to benefit the lots in the subdivision, and those who bought them as well as the Stephens Company. *Sanford v. Keer,* 80 N. J. Eq. 240, 83 A. 225, 40 L.R.A. (N.S.) 1090. The soundness of this conclusion is shown by another factor. Since the Stephens Company did not contemplate reserving any part of the land and did not do so, it necessarily intended that the protection of the restrictive covenants should inure to the benefit of the purchasers of the lots in the subdivision, and that each of the purchasers should be entitled to enforce them as against all of the others.

It follows, therefore, that the evidence of the plaintiffs was sufficient to sustain a finding that the restrictive covenants were placed in the deeds pursuant to a general plan to develop Blocks 11-C and 11-D of Myers Park as a restricted residential community or neighborhood.

The defendants assert with much strenuosity, however, that even this conclusion does not warrant the reversal of the compulsory nonsuit. They say that Blocks 11-C and 11-D of Myers Park have lost their residential character since the restrictions were created, and that in consequence it would be oppressive and inequitable to give the restrictions effect as against their lot. This claim is predicated on the evidence that traffic has increased on Baldwin Avenue, East Morehead Street, Henley Place, and King's Drive, and that business establishments have grown up in territory adjoining or surrounding the subdivision.

The testimony invoked by the defendants on this phase of the case does not show that the increased traffic has substantially impaired the suitability of lots in Blocks 11-C and 11-D for residential purposes. *Continental Oil Co. v. Fennemore,* 38 Ariz. 277, 299 P. 132; *Strong v. Hancock,* 201 Cal. 530, 258 P. 60; *Ludgate v. Somerville,* 121 Or. 643, 256 P. 1043, 54 A.L.R. 837.

It does disclose, however, that all business changes have occurred in territory outside the development. There is not a single business estab-

lishment within the subdivision. It is, indeed, utilized exclusively for residential purposes in conformity to the restrictions. This being so, the fact that adjoining or surrounding property is now used for business purposes does not alter the character of the subdivision itself, and those who have been led to buy lots or build homes in that locality by reason of the restrictive covenants are entitled to have their property preserved for the purpose for which they purchased it. *Vernon v. Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710; *Turner v. Glenn, supra; Brenizer v. Stephens, supra; McLeskey v. Heinlein, supra.*

This conclusion compels a further decision for the plaintiffs on the secondary question arising on the appeal. The court erred in permitting the defendants to cross-examine the plaintiff, E. R. Higdon, as to changed conditions outside the development. *Turner v. Glenn, supra; Brenizer v. Stephens, supra.*

For the reasons given, the compulsory nonsuit is

Reversed.

IN THE MATTER OF THE WILL OF T. M. FRANKS.

(Filed 14 December, 1949.)

1. Wills § 6—

It is not necessary that testator sign his will in the presence of the attesting witnesses, but if he does not do so he must acknowledge his signature either by acts or conduct.

2. Wills § 7—

It is not required that subscribing witnesses sign same in the presence of each other but they must sign simultaneously with or subsequent to the signing of the instrument by testator.

3. Wills § 24—

Testimony of one subscribing witness to the effect that he signed the instrument at the request of testator simultaneously with the testator, and testimony of the other that when he signed same it had already been signed by testator, together with testimony that testator stated to the witnesses that the instrument was his will and requested them to sign same, *is held* sufficient to show formal execution of the will, G.S. 31-3, and to support the charge of the court thereon.

4. Wills §§ 22, 25—

The burden of proof on the issue of mental capacity is on caveators, and therefore an instruction to the effect that if the jury should find from the greater weight of the evidence that the will had been executed in conformity with law to answer the issue of *devisavit vel non* in the affirmative "unless the evidence satisfies you that at the time" testator did not have testamentary capacity, is not error.

5. Wills §§ 23b, 23c—

Testimony that some three years prior to the execution of the will attacked on the ground of undue influence and mental incapacity, testator had executed an instrument making practically the same disposition of his property, is competent upon the issue of mental capacity and undue influence.

6. Wills § 23c—

The exception to the exclusion of testimony of a witness that the general public thought the testator was influenced by propounder to make the will is without merit when the witness also testifies to the effect that he did not know it to be a fact that testator was so influenced.

7. Same—

Where caveators introduce evidence to the effect that propounder, prior to the execution of the will, had been given certain property by his father, the testator, it is competent for propounder to introduce a written statement executed by his father, duly identified, to the effect that propounder had paid full purchase price for the property in question.

8. Wills §§ 23b, 23c—

The fact that testator devises his property to one child to the exclusion of others, or to strangers in blood to the exclusion of blood kin, is competent to be considered with other evidence on the question of mental capacity and undue influence. But in the present will the testator explained his reason for leaving the greater portion of his property to one of his sons, and therefore testimony that testator had no reason for a disproportionate distribution of his estate was properly excluded.

9. Wills §§ 21c, 25—

Instructions to the jury to the effect that undue influence need not necessarily involve moral turpitude or even bad or improper motive, but that it is such influence by fraud or force or both as to amount to a substitution of the will of the influencing party for that of testator, *is held* without error.

10. Same—

Instructions on the issue of undue influence to the effect (1) that whether it was exerted by the beneficiary or by any other person in his behalf is a deduction to be made by the jury from all the evidence, (2) that mere persuasion would not render a will void in the absence of imposition or fraud, and (3) influence gained by kindness and affection is not undue influence even though it induced testator to make an unequal and unjust disposition of his property, if such disposition was voluntarily made, *held* without error.

APPEAL by caveators from *Stevens, J.*, at May Civil Term, 1949, of WAKE.

Issue of *devisavit vel non* decided in favor of propounder.

T. M. Franks died in February, 1948, leaving a last will and testament dated 12 September, 1940, which was duly admitted to probate in common

form in Wake County. The widow of the testator and all his children and grandchildren, except his son, David Preston Franks, chief beneficiary under the terms of the will, caveated the will and it was propounded for probate in solemn form. Four issues were submitted to the jury and answered as follows:

"1. Was the paper writing propounded, dated the 12th day of September, 1940, executed by T. M. Franks, according to the formalities of the law required to make a valid last will and testament? Answer: Yes.

"2. At the time of signing and executing said paper writing did said T. M. Franks have sufficient mental capacity to make and execute a valid last will and testament? Answer: Yes.

"3. Was the execution of the paper writing, propounded in this cause, procured by undue influence, as alleged? Answer: No.

"4. Is the said paper writing referred to in Issue No. 1, propounded in this cause, and every part thereof, the last will and testament of T. M. Franks, deceased? Answer: Yes."

From judgment on the verdict, the caveators appeal and assign error.

Bickett & Banks for propounders.

Simms & Simms for caveators.

DENNY, J. The grounds relied upon by the caveators in the trial below were non-execution, mental incapacity and undue influence.

The caveators except and assign as error the following portion of his Honor's charge: "Now, Gentlemen, if this evidence satisfies you by its greater weight that Mr. T. M. Franks did sign this paper in the presence of Mr. Johnny Murray and Mr. F. T. Carroll, and asked them to sign it as subscribing witnesses and he also signed it, and has further satisfied you by its greater weight, the burden being upon Mr. D. P. Franks, that they were told by him that he had signed the paper and that he requested them to sign it and that they signed as subscribing witnesses, that all of these witnesses were requested to sign by him as subscribing witnesses and they all signed as such in his presence and at his request, then that would constitute what the law calls a formal execution of the paper writing and under those circumstances, nothing else appearing, if the evidence satisfies you that the requirements, as I have indicated them, of the law, were complied with, then you would answer the issue Yes, the first issue, unless the evidence satisfies you that at the time he made the will he did not have mental capacity, what is known as testamentary capacity, that is, that the execution was procured by undue influence."

This assignment of error challenges the sufficiency of the evidence to show that T. M. Franks executed his will according to the formalities required by law.

Johnny Murray and J. T. Carroll, the subscribing witnesses, each testified that he signed the purported will of T. M. Franks, at his request and in his presence, but not in the presence of each other.

J. T. Carroll testified that Mr. T. M. Franks requested him a time or two to stop by in passing, "that he had a paper he wanted to get me to sign, so I stopped in, and he brought the paper out. He told me what it was, and I signed it in his presence." Later in the trial this witness was recalled, and counsel for propounder asked this question: "I don't recall whether I asked you or not, but please state whether or not the purported will of Mr. Franks was signed by him at the time you signed it." Answer: "Yes, it was."

Johnny Murray testified, Mr. Franks requested him to come to his house, "that he wanted him to sign his will, and so he did, and he was in Mr. Franks' home, in the sitting room, the two were present and no one else. . . . Mr. Franks brought the paper in the sitting room and that he (the witness) signed it." In response to a question as to what statement, if any, Mr. Franks made concerning the paper, the witness said: "Well he told me that was the will he wanted me to sign. . . ." Thereafter, on cross-examination by counsel for the caveators, the witness, according to the record, testified "that he did not see Mr. Franks sign the paper, that it was already signed when the witness signed it; when the witness signed it, Mr. Franks' name was already on it."

It is not necessary for a testator to sign his will in the presence of the attesting witnesses. However, he must do so, or acknowledge his signature in their presence. This acknowledgment need not be in words, but may be by acts and conduct. And, while subscribing witnesses to a will must sign such instrument in the presence of the testator, it is not required that such witnesses sign in the presence of each other. *In re Will of Bowling,* 150 N.C. 507, 64 S.E. 368; *In re Herring's Will,* 152 N.C. 258, 67 S.E. 570; *Watson v. Hinson,* 162 N.C. 72, 77 S.E. 1089; *In re Broach's Will,* 172 N.C. 520, 90 S.E. 681; *In re Will of Deyton,* 177 N.C. 494, 99 S.E. 424; *In re Will of Johnson,* 182 N.C. 522, 109 S.E. 373; *In re Will of Fuller,* 189 N.C. 509, 127 S.E. 549; *In re Will of Kelly,* 206 N.C. 551, 174 S.E. 453; *In re Will of Etheridge,* 229 N.C. 280, 49 S.E. 2d 480.

In order to prove the formal execution of a will by subscribing witnesses, as required by G.S. 31-3, it must appear that the will was signed by the testator or some other person in his presence and by his direction, and subscribed in his presence by at least two witnesses. *Watson v. Hinson, supra.* And when the testator does not sign the will in the presence of the witnesses, the signature should be acknowledged by him. This acknowledgment, however, which may be inferred from the acts and

conduct of the testator (*In re Herring's Will, supra*) presupposes that the testator had signed his purported will prior thereto.

The law contemplates that the signing of a will by the testator shall precede the attestation, or that the testator and witnesses sign cotemporaneously in the presence of each other, so as to constitute one transaction. *Cutler v. Cutler,* 130 N.C. 1, 40 S.E. 698. There must be a signature to acknowledge or attest before there can be an acknowledgment or attestation. *In re Will of Pope,* 139 N.C. 484, 52 S.E. 235; *In re Will of Baldwin,* 146 N.C. 25, 59 S.E. 163; *In re McDonald's Will,* 219 N.C. 209, 13 S.E. 2d 239. *In re Will of Pope, supra, Hoke, J.,* speaking for the Court, said: "In construing the statute as to written wills, with witnesses, it is accepted law that the witness must *subscribe* his name to the paper writing *animo testandi,* in the presence of the testator, and *after* the testator has himself signed the same."

In this case, we have the testimony of the subscribing witnesses to the effect that the purported will was already signed when they subscribed their names as witnesses thereto. Carroll's testimony bearing on this point, is to the effect that the purported will of Mr. T. M. Franks was signed by him at the time he (the witness) signed it. And the other subscribing witness testified on direct examination, that he knew the handwriting of the testator, and on cross-examination he testified that when he witnessed the purported will "it was already signed . . . Mr. Franks' name was already on it."

This evidence, when considered in the light of the testator's conduct in procuring these neighbors to witness his will, and his statement to the witnesses that the instrument was his will, together with the fact that his name already appeared hereon, is sufficient to meet the requirements of the statute as to the formal execution of the will. Moreover, no question has been raised by the caveators, as to the genuineness of the signature of the testator.

Therefore, the above portion of the charge was not prejudicial to the caveators, and the exception thereto will not be sustained. On the other hand, if the jury had answered the first issue in favor of the caveators, the propounders might have shown error, since the court instructed the jury in sum and substance that if the testator had already signed the will when the witnesses subscribed their names thereto, the jury was required to find that the testator told the witnesses at the time they witnessed the will that he had signed it. The acknowledgment of his signature in words, as heretofore pointed out, is not necessary, but may be inferred by the acts and conduct of the testator. *In re Herring's Will, supra.*

The caveators further complain of the instruction on the first issue because his Honor added these words: "Unless the evidence satisfies you that at the time he made the will he did not have mental capacity, what

is known as testamentary capacity, that is, that the execution was procured by undue influence." The burden on this issue was on the propounder, and the instruction was not prejudicial to the caveators.

Exceptions 4 through 21½ and 23 and 24, are directed to the admission of the testimony of Mr. Sam Morris, who prepared a will for the testator in 1937, and redrafted the instrument at the request of the testator in 1940, making certain minor changes therein, none of which, according to the testimony, affected or in any way changed the devise now under attack. And the substance of Mr. Morris' testimony is to the effect that in 1937 he drew a will for Mr. Franks; that Mr. Franks gave him all the information he had in drafting the will and that the devise to Preston Franks was identical in both instruments. The evidence was admissible on the issue as to mental capacity and as to undue influence. *Ruffin, C. J.,* in speaking for the Court, in *Love v. Johnston,* 34 N.C. 355, said: "Minutes for a will are common evidence of capacity and the *animus testandi;* and letters, or verbal declarations, containing expressions of preference for particular persons, or importing a voluntary purpose of making particular dispositions, are the ordinary means of rebutting the imputation of undue solicitation or influence."

These and other exceptions challenging the admissibility of evidence bearing on the mental capacity of the testator to execute a will on 12 September, 1940, are without merit. The evidence is overwhelmingly in favor of an affirmative answer to the issue, relating to the mental capacity of the testator at the time he executed his will. As a matter of fact, the evidence offered by the caveators alone is sufficient to sustain the verdict of the jury on this issue.

Exceptions 1 and 2 are directed to the refusal of the court to admit the testimony of a witness as to what the community generally thought as to whether or not Mr. Franks was especially influenced by his son Preston from time to time. The witness, if permitted to answer, would have said: "The general public thinks he was persuaded to make the will." However, the witness in answering for himself, as to whether he thought he was especially influenced by his son Preston, said, "I don't know that to be a fact." *Myatt v. Myatt,* 149 N.C. 137, 62 S.E. 887. The exceptions are without merit.

The caveators except and assign as error, the ruling of the trial judge in permitting the propounder to introduce and read in evidence a paper writing which had been duly identified, which is as follows:

"To whom it may concern:

"Since it has been intimated that I gave my son, Preston, his present home at McCullers and since the assertion is untrue, I desire to state the facts about the matter.

"I did bid the place in for my son, Preston, for the sum of $4,000.00 dollars. I put one thousand $1,000.000 dollars in the place of my own money and Preston put one thousand $1,000.00 dollars of his own money in the place. We then jointly borrowed two thousand $2,000.00 dollars from the Commercial National Bank of Raleigh, N. C. I took title to the place as a matter of safety, as I was responsible for three thousand $3,000.00 dollars of the purchase price. A little later Preston paid the bank its two thousand $2,000.00 dollars and a little later he paid me back the one thousand $1,000.00 dollars that I advanced on the place. I then gave my son, Preston, a clear title to the place for love and affection. I did not give my son, Preston, one dollar on the place. He, Preston, paid for it in full from his own money.

"I affirm the above statement is correct.

(s) T. M. FRANKS (Seal)

"Witness: J. T. CARROLL
NORWOOD CARROLL."

The caveators contend that the witnesses did not testify as to the transaction referred to in this paper writing, and that its admission was highly prejudicial and tended to confuse the jury; that it had no proper place in the testimony relating to the trial. This exception might have merit were it not for the fact that the caveators undertook to show by the brother of the testator that the propounder had obtained the tract of land referred to in the above instrument, without consideration. The Rev. Jesse E. Franks testified, "that my brother Cad (T. M. Franks) bought land down there from my oldest brother, Nat, and I know Preston owned it later on. As to definitely hearing them say just when, I don't know. But Preston owned the land that Nat formerly owned and Cad bought it from Nat. I was told that Cad paid $4,000.00 for that property. It was in McCullers. That is where Preston lives. I never knew of Preston paying my brother anything at all for that place." In the face of this testimony, the exception is feckless.

A careful consideration of all the evidence adduced in the trial below would seem to support the conclusion that the caveators relied more upon the unnaturalness of the will, to show undue influence, than upon the conduct of the propounder. The propounder was devised the home place of the testator, subject to the payment of $4,000.00 for the benefit of several other children and grandchildren of the testator; and subject to the right of his second wife to occupy and use the house and out-buildings, including yard lot and all other buildings used by the testator and his wife, for her life or until she remarried. The testator set out in his will that he had sent certain of his children to college and that they were indebted to him; that one of them had received more than his share, but

he gave and bequeathed to them all the respective sums owed to him by them. Several witnesses testified the 113 acre farm devised to Preston Franks, the propounder, was worth from $10,000.00 to $15,000.00 in 1940.

The law presumes that every man has the mental capacity to make a will, and anyone alleging otherwise has the burden of showing the lack of such mental capacity. And where a testator devises the whole of his estate to one child, to the exclusion of other children, in the absence of some reasonable ground for such preference, or devises his property to strangers in blood, to the exclusion of his blood kin, such fact may be considered, with other evidence, on the question of mental capacity and undue influence. *In re Will of West,* 227 N.C. 204, 41 S.E. 2d 838; *In re Will of Redding,* 216 N.C. 497, 5 S.E. 2d 544; *In re Hardee's Will,* 187 N.C. 381, 121 S.E. 667; *In re Staub's Will,* 172 N.C. 138, 90 S.E. 119; *Ross v. Christman,* 23 N.C. 209.

However, the will under consideration gives a reasonable explanation as to why the testator disposed of his property in the manner set forth in the will. Therefore, we do not think it can be considered what in law is termed an unnatural will. *In re Will of Cooper,* 223 N.C. 34, 25 S.E. 2d 166.

The 45th exception and assignment of error is to the following portion of his Honor's charge: "One who is incapable at the moment of signing the paper of comprehending the nature and extent of his property, the disposition to be made of it and the persons who or should be provided for, is not of disposing memory, and if such mental condition be really shown to exist the will must fail and fall even though he may have a flickering knowledge that he is endeavoring to make a testamentary disposition of his property." The exception is without merit, this portion of the charge is in the exact language of the charge in *In re Craven's Will,* 169 N.C. 561, 86 S.E. 587, which was upheld by this Court.

The 51st exception and assignment of error is to the following excerpt from the charge: "Undue influence is defined to be an influence by fraud or force or both, and if its application to the making of a will signified that through one or both of these means the will of the decedent, and that is in this case T. M. Franks, was perverted from its free action and thrown aside entirely and the will of influencing party substituted for it, the fraudulent influence overruling or controlling the mind of the person operated on."

The caveators complain of the definition given of undue influence, particularly in view of the fact that the court had previously said: "That undue influence does not necessarily involve moral turpitude or even bad or improper motive," etc. *In re Will of Efird,* 195 N.C. 76, 141 S.E. 460; *In re Broach's Will, supra; In re Craven's Will, supra.* The charge as

given is substantially in accord with the definition given by *Manly, J.*, in the case of *Wright v. Howe,* 52 N.C. 412, and cited with approval in *In re Craven's Will, supra.* See also *In re Abee,* 146 N.C. 273, 59 S.E. 700. The exception cannot be upheld, for undue influence is a fraudulent, overreaching or dominant influence over the mind of another which induces him to execute a will or other instrument materially affecting his rights, which he would not have executed otherwise. Or, to put it another way, it means the exercise of an improper influence over the mind and will of another to such an extent that his professed act is not that of a free agent, but in reality is the act of the third person who procured the result. *Lee v. Ledbetter,* 229 N.C. 330, 49 S.E. 2d 634; *In re Will of Harris,* 218 N.C. 459, 11 S.E. 2d 310; *In re Will of Turnage,* 208 N.C. 130, 179 S.E. 332; *In re Will of Efird, supra; In re Will of Cross,* 173 N.C. 711, 91 S.E. 956; *Myatt v. Myatt, supra.*

The 52nd, 53rd and 54th exceptions and assignments of error are to the following parts of the charge: (1) "But while undue influence, as thus defined, may void a will, whether it was exerted by the beneficiary or by any other in his behalf is a deduction to be made by the jury from all the evidence." (2) "A will is not void because it has been obtained by persuasion; to make it void the persuasion must be undue and fraudulent." (3) "Influence gained by kindness and affection will not be regarded as undue if no imposition or fraud is practiced, even though it induces the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and administered to his wants, if such disposition is voluntarily made."

Here again the identical language complained of was approved in *In re Craven's Will, supra.* In *Gilreath v. Gilreath,* 57 N.C. 142, *Pearson, J.*, said: "A child is allowed to use fair argument and persuasion to induce a parent to make a will or deed in his favor."

There are many other exceptions to the charge, but when it is considered contextually, as it must be, it is in substantial accord with our decisions, and is free from prejudicial error.

Altogether the record contains 70 assignments of error. We have not undertaken to discuss all of them. However, a careful examination of each one of them, considered in connection with the entire record, leaves us with the impression that the case was fairly tried and no substantial or prejudicial error has been shown.

The verdict and judgment will be upheld.

No error.

L. B. CHERRY AND JOANNA RAYNOR v. J. E. ANDREWS AND MARY W. GODDARD.

(Filed 14 December, 1949.)

1. Appeal and Error § 51a—

The determination on a former appeal that exceptions taken to the report of the referee and tender of issue thereon made by defendant was a sufficient compliance with the rules to entitle him to a jury trial, precludes the matter, and plaintiff's motion upon the subsequent trial for judgment on the referee's report and objection to the submission of the issue tendered are properly overruled.

2. Reference § 14d—

The findings of fact and conclusions of law of the referee are not competent as evidence in the trial of the issue raised by exceptions to the report. G.S. 1-189.

3. Trial § 36—

Where the issues submitted present to the jury all proper inquiry as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly, they are sufficient, and exceptions thereto will not be sustained.

4. Boundaries § 3b—

Where a call in plaintiff's deed is down a branch to a swamp then up said swamp, the question of whether the call runs to the edge of the swamp or further into the swamp to its thread is a question of fact for the determination of the jury from all attendant evidence, and exceptions to the charge which fairly and correctly submits this question to the jury and exceptions to the refusal to give requested instructions to the effect that as a matter of law the call would take the line to the thread of the swamp, cannot be sustained.

5. Appeal and Error § 51a—

Principles of law enunciated on a former appeal become the law of the case, and exceptions to the charge and rulings of the court upon the subsequent trial in substantial accord with such principles will not be sustained.

APPEAL by plaintiffs from *Bone, J.*, at February Term, 1949, of BERTIE.

Civil action to recover land, and for damages on account of trespass thereon.

This case was here on former appeal, 229 N.C. 333, 49 S.E. 2d 641, where the facts pertinent thereto are stated. However, in the light of the record, as it now appears, we deem it expedient to recount the case in pertinent aspects.

Plaintiffs allege in their complaint that they are the owners in fee simple of two certain specifically described tracts of land in Windsor

Township, Bertie County, North Carolina,—the boundaries of the second tract only are controverted.

Defendants, answering the allegation of ownership of the land described in the complaint, admit that "the plaintiffs own title to the Benjamin Raynor lands, which are more particularly described in the Benjamin Raynor land division of record in Book 172, at page 126, *et al*, Bertie County Public Registry"; and they aver "that the eastern boundary of said land begins at a marked gum tree on or near the banks of Cashie River, and extends a northerly direction from said marked gum tree, and the southern boundary line of said land runs from said marked gum tree north 85 deg. west 36⅔ poles; then north 70 deg. 30 min. west 16 poles a chopped beech tree, all as designated on the plat of Benjamin Raynor land division and which said line adjoins the Watson Tayloe heirs land . . ."

And upon the hearing before the referee, plaintiffs offered evidence in pertinent part, substantially as follows:

1. The admission of defendants, as above stated, that is, that "plaintiffs own title to the Benjamin Raynor lands . . ."

2. A deed from Jonathan S. Tayloe to Watson Tayloe, dated 20 September, 1869, Book NN, page 250, description reading as follows:

"Beginning at a ditch across the road leading from James Duers to the old mill across Chiskey, James Duers' line; then down said ditch and branch James Duers' line, to a large gum, said Duers' corner; thence continuing down said branch until it intersects another branch a short distance above the crossing place in traveling to the Old Chiskey Mill seat; thence continuing down said last named branch a part of which is ditched to a large dead cypress tree standing about 30 yards from the field fence; thence continuing nearly parallel with the fence through the swamp to the Main Run of Cashie River; thence up the Main Run of Cashie to where the Main Run of Chiskey enters into Cashie; thence up Chiskey run to the Old Mill seat, continuing from thence to James Duers' line, following his line to the road, including a small piece of land on which Abram Phelps resides; thence along the road to the Beginning, containing 200 acres more or less." And plaintiff offered testimony tending to show that the description in this deed covers the land now in controversy.

Plaintiff also offered two deeds from Watson Tayloe to Benjamin Raynor, one in 1878 for 100 acres of land, and the other in 1886 for 50 acres of land, and offered evidence tending to show that the land conveyed by these two deeds are parts of the tract obtained by Watson Tayloe from Jonathan Tayloe, as above set forth; and that the description in the older deed runs "to the run of Cashie Swamp; thence up the run to the run of Chiskey Branch."

And plaintiff also offered in evidence a mortgage deed from Watson Tayloe and wife to William J. Myers, dated 18 March, 1890, registered in Book 68, page 244, the description being the same as the second tract in the complaint, and is as follows:

"Beginning at the Benjamin Raynor back gate on the path leading to where Watson Tayloe now resides, and running said path to the branch; thence down the branch to Cashie Swamp; thence up said swamp to Benjamin Raynor's line; thence up said line to the Beginning, containing 150 acres, more or less, being a part of the Joanna S. Tayloe land."

And also a deed from William J. Myers, mortgagee, and John Hughes to Benjamin Raynor, dated 9 February, 1892, registered in Book 99, page 387, in which the recitals are that "William Myers sold under power; John Hughes bought; assigned his bid to Benjamin Raynor"—the description being the same as in the mortgage deed from Watson Tayloe to William J. Myers, registered in Book 68, at page 244, as above set forth. (And it is the contention of plaintiffs that the description in the mortgage covers the then unsold portion of the tract of land Jonathan Tayloe conveyed to Watson Tayloe as described above.)

And plaintiff also offered testimony tending to show that the land described in the said mortgage adjoins and lies south of the land described in the first deed from Watson Tayloe to Benjamin Raynor as above set forth.

And the plaintiff offered testimony tending to show that the branch referred to in the call "thence down the branch to Cashie Swamp" extended from the highlands through the swamp land into the run of the swamp or Cashie River. Defendants offered evidence to the contrary.

The referee, in his report, finds as facts, among other things: "Fourth: That the lands in controversy in this action are swamp lands . . . That there is a well defined line of demarcation between the high land and the swamp land, being as high in some places as ten feet.

"Fifth: That there is some appreciable physical evidence of a branch extending from said point A (in red) to the run of Cashie Swamp; That the call in the aforesaid mortgage deed, Book 68, page 244, 'thence down the branch to Cashie Swamp' has as its northern terminus the run of Cashie Swamp; and the call of boundary in said mortgage deed 'thence up said swamp' etc., is the run of said Cashie Swamp . . .

"Ninth: That the true dividing line between the lands of the plaintiffs and the said Mrs. Gladys W. Tayloe, under whom defendants claim, is the projection in a straight line of the eastern boundary of the aforesaid Lot No. 5 to the run of Cashie Swamp, and thence in a general northern direction along the run of Cashie Swamp."

And the referee made his conclusions of law in keeping with such findings of fact.

Defendants filed exceptions Nos. 3, 4 and 8 to the 4th, 5th and 9th findings of fact, respectively, and tendered this issue.

"1. Are the plaintiffs the owners of and entitled to the possession of lands lying east of a line extending from a marked gum tree north 85 deg. west 36⅔ poles; north 70 deg. 30 min. west 16 poles to a chopped beech tree and situate between the highwater mark of Cashie Swamp and the run of Cashie Swamp"? as being particularly raised by defendant's exceptions 3, 4 and 8.

Plaintiffs thereafter moved the Superior Court (1) to overrule the exceptions of defendants, and (2) for judgment confirming the report. The motions were overruled, and plaintiff excepted.

And when the case came on for hearing at May Term, 1948, as stated in opinion on former appeal, the trial court entered judgment as of nonsuit, predicated upon the premises that "counsel for plaintiffs admitted in court that if the description in the deed from Myers, mortgagee, to Benjamin Raynor does not extend from red letter 'A' on the map sent by the referee with the report, on to the run of Cashie Swamp the plaintiffs could not recover . . . and it being admitted by parties plaintiff and defendants that Cashie River is a non-navigable stream, and the court having considered the report, exceptions and the evidence bearing upon the sole question involved as to the proper location of plaintiffs' lines, and the court being of the opinion upon the record and admissions made in court that plaintiffs are not entitled to recover."

And plaintiffs in their brief filed on the appeal to this Court, presented as "Questions Involved" these two: "1. Whether the line of the deed from Myers, mortgagee, to Ben Raynor, 'thence down the branch to Cashie Swamp,' stops at the edge of the swamp as shown by red 'A' on the division map, or goes to the run of Cashie Swamp (Exceptions 2, p. 21, and 3, p. 29); and

"2. Whether the exceptions filed by defendants to the report of the referee conforms to positive statutory requirements and decisions of this Court. (Exception No. 1, R. p. 20.)"

The decision of this Court, reported in 229 N.C. 333, 49 S.E. 2d 641, was (1) "that whether the call 'thence down the branch to Cashie Swamp' terminates at the edge of the swamp or extends on to the run of it, involves a matter of fact to be found by the jury upon the evidence offered"; and (2) that "testing the exceptions to the referee's report filed by defendants, and their tender of issues by rules of procedure for preserving right to jury trial in a compulsory reference case, as enunciated in decisions of this Court, it appears that they meet the requirements sufficiently to withstand successful attack." For error pointed out the judgment of nonsuit was reversed.

The record now before us on this appeal shows that when the case was called for trial:

1. Plaintiffs moved for judgment on the report of the referee. Motion overruled. Exception.

2. Plaintiffs objected specifically to the first issue tendered, which issue was amended on motion of defendants, substituting the word "south" for the word "east," as appeared in the original exceptions,—objection being based on the ground that the issue did not arise from the findings of the referee and the pleadings. Overruled. Exception.

The case was thereupon submitted to the jury upon the evidence offered by the parties on the hearing before the referee, and under the charge of the court, and on the issue quoted above, to which the jury answered "No."

Plaintiffs requested certain special instructions to the jury. The court gave them in modified form, to which plaintiffs excepted.

And from judgment for defendants plaintiffs appeal to Supreme Court and assign error.

H. S. Ward for plaintiffs, appellants.

J. A. Pritchett and F. T. Dupree, Jr., for defendants, appellees.

WINBORNE, J. Plaintiffs challenge, on this appeal, the correctness of the judgment from which appeal is taken, on several grounds. However, after careful consideration of each exception, we are constrained to hold that error of sufficient import to justify disturbing the judgment is not shown.

I. The first and second exceptions may be treated together. They relate (1) to the overruling of plaintiffs' motion for judgment on the report of the referee, and (2) to the submission of the first issue. It is contended that no issue was submitted in defendants' exception on the finding of fact No. 5,—"which presented the pivotal and controlling point in the case," that is, "that the line in the Tayloe mortgage and the Ben Raynor deed went to the run of the swamp." And it is contended that the first issue does not arise on the pleadings and findings of the referee. Moreover, it is stated, in reference to these exceptions, that "it is apparent that the report of the referee has been treated as of no more significance than a judgment of a J. P." But be that as it may, these exceptions relate to straw threshed out on former appeal. Reference to the exceptions filed by defendants, as shown in the records on former appeal and on this appeal discloses that exception is made specifically to finding of fact No. 5, and the first issue tendered by defendants is expressly directed to this finding of fact. And on the former appeal the question of the suffi-

ciency of the exceptions and tender of issues to preserve defendants' right to a jury trial, was raised, and considered, and determined.

It is true that the former appeal also challenged the ruling of the court in granting the nonsuit. But since it was held (1) that whether the call "thence down the branch to Cashie Swamp" terminates at the edge of the swamp or extends on to the run of it, involves a matter of fact to be found by the jury upon the evidence offered, and (2) that the issue tendered was sufficient to withstand successful attack, confirmation of the report of the referee was not in order. It must be borne in mind that the reference had in this action was ordered under the provisions of the statute providing for compulsory reference. G.S. 1-189. Under this Section it is declared that "the compulsory reference . . . does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the evidence taken before the referee." And the decisions of this Court hold that the report of the referee, consisting of his findings of fact and conclusions of law, would not be competent as evidence before the jury. See *Bradshaw v. Lumber Co.,* 172 N.C. 219, 90 S.E. 146, and *Booker v. Highlands,* 198 N.C. 282, 151 S.E. 635.

And it is not inappropriate to say that while the first issue might have been framed differently, it arose upon the pleadings, G.S. 1-196, and was, and is deemed sufficient to present to the jury the controverted question as to whether plaintiffs own the swamp land lying between their highland and the run of Cashie Swamp. Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *Lister v. Lister,* 222 N.C. 555, 24 S.E. 2d 342, and cases cited.

II. Exceptions Nos. 3 to 9, both inclusive, grouped under two headings, bring into focus the principles of law for proper construction of the description in question.

Exception No. 3 relates to three deletions from instructions requested by plaintiffs as follows: "It is a general rule of law for the construction of deeds, that where a deed calls for a swamp, or creek not navigable it extends to the run or thread of the stream"; "If the run of the branch can be defined and appears to extend beyond the edge of the swamp and into the swamp, the law carries that line to the run"; "You may consider the nature and character of the branch, beyond the edge, if it is definite, then this deed and its call would go on to the run of the swamp,"—eliminating the words, "then this deed and its calls would go to the run." It is insisted that these requests are not met in the general charge.

And Exceptions 4 to 9, both inclusive, are directed to portions of the charge as given, and "are collected," as plaintiffs say "as presenting the

same question, whether the construction of this deed and its line by the call 'to the swamp' followed by the next call 'thence up the swamp,' presents a WHAT and not a WHERE."

Exception 6 is directed to this charge: "As I understand it the deed from the mortgagee to Benjamin Raynor has the same description as this mortgage. You see this description does not say whether the edge of the swamp or the run of the swamp but says, 'thence down the branch to Cashie Swamp,' and therefore it becomes necessary to decide in this case, and it is the question for the jury to decide as to whether the description takes it to the edge of the swamp or to the run of the swamp."

Exception No. 7 is to that charge, immediately following that to which Exception No. 6 relates, reading: "If the deed had said specifically that it went to the run of the swamp, then there would not have been any question about it, or if it had said to the edge of the swamp there would have been no question about it, but when it says 'down the branch to Cashie Swamp,' it leaves the matter in such a state that the court cannot determine it as a matter of law but it is for the jury to say what was meant, taking into consideration all the evidence and the surrounding facts and circumstances described by the evidence."

And, continuing, the court charged: "I charge you as a matter of law that where a creek is called for by name, nothing else appearing, the call must go to the running stream, and when neither the side line or the bank, nor the middle line is expressed, the conclusion of law is, that the channel or middle line is intended. This rule applies when the natural object is unique or has properties or characteristics peculiar to itself and which admit of its easy and certain identification, as a creek or river. There is then no ambiguity in the call, and resort to oral evidence is not necessary in order to fit the description to the thing. (But when, as in this case, the Cashie Swamp is called for it is for the jury to say upon the evidence what was intended, whether the edge of the swamp or whether the run of the swamp)." The portion in parenthesis only is the subject of Exception No. 8.

And continuing the court further charged: "The law in this situation will not say arbitrarily whether it is the run of the swamp or the edge of the swamp, but it is a question of fact for the jury to determine upon all the evidence as to which was intended by the call in this mortgage and in this deed."

Exception No. 9 is to court charging that the first issue, reading it, will be submitted to the jury.

Then, after stating the contentions of the parties, the court, at the request of plaintiffs, gave these instructions: "The question is whether that mortgage from Watson Tayloe to Wm. J. Myers . . . and the deed from Wm. Myers to Benj. Raynor . . . covered the land in controversy.

That question seems to turn upon the question whether the call in the mortgage and the deed: 'thence down the branch to Cashie Swamp' extends to the run of that swamp. The court is leaving that question to you. In determining this question, the jury may consider whether the branch, by a perceptible run or line, reaches the run or thread of the stream. Another aid to the jury is the consideration of the next line, which in your case is: 'thence up the swamp' to what is admitted to be a tract owned by Benj. Raynor at the time this deed was made. You may also consider the nature and character of the branch beyond the edge and if it is definite. The plaintiffs contend that they have shown, to your satisfaction, that this branch does extend beyond the edge and on to the run of the swamp."

In connection with these portions of the charge, it is to be recalled that on the former appeal, it is held by this Court: "In the light of applicable principles of law declared in the case of *Rowe v. Lumber Co.*, 133 N.C. 433, 45 S.E. 830, particularly in respect of the 'Watkins 50-acre tract,' and again in same case reported in 138 N.C. 465, 50 S.E. 848, in which *Brooks v. Britt,* 15 N.C. 481, is cited with approval, it would seem that whether the call 'thence down the branch to Cashie Swamp' terminates at the edge of the swamp or extends on to the run of it, involves a matter of fact to be found by the jury upon the evidence offered."

In *Brooks v. Britt, supra,* in opinion by *Gaston, J.*, the Court had this to say: "His Honor was unquestionably correct in laying it down as a principle in law, that the swamp was a natural object more certain, and therefore more worthy of reliance than the distances called for in the grant; that this swamp was in law a boundary of the patent, and that the defendant's grant must be extended to it, if the distances would not reach, and restrained by it, if these distances overreached it. But we are of opinion that he erred in pronouncing that if there was a certain and known channel for the water to run in said swamp, the call of the grant was for that run. Whether the run in the boggy and sunken land, or the margin of such boggy and sunken land, was the call of the grant, depended upon facts fit to be proved, and proper to be passed upon by the jury. If, when the grant issued, the low grounds were known as the Swift Creek Swamp, and the run or channel was not termed the swamp, but had another appellation, such as Swift Creek, or east prong, or any other distinctive name, then the call of the grant was for those low grounds, and not for the run. If, on the contrary, the run was then known as Swift Creek Swamp, and the bottom lands were distinguished from it as the low grounds of that swamp, then indeed, the call was for the run, and not for the low grounds. If each were known by the same appellation, and indiscriminately called Swift Creek Swamp, then there were two

natural objects, either of which corresponded with the call of the grant, and which of these was intended, might and ought to be determined by reference to other matters of description in the grant, or to extrinsic facts, rendering the one or the other more probable."

And in *Rowe v. Lumber Co., supra,* in respect of the Watkins 50-acre tract, *Walker, J.,* wrote for the Court: "The question raised in regard to this tract is as to its proper location, and this largely depends upon the determination of its first or beginning call . . ."

And further on in the opinion in this same case, the Court said: "But the plaintiffs contend that the third call, which is 'thence said (Old Field) branch to Catskin,' should stop at the edge of the swamp, or, at least, that the matter should be left to the jury so that they can determine what is meant by 'Catskin,'—that is, whether the edge or the run of the swamp was intended. The defendant insists that the call should go to the run, but if, as a matter of law, the run is not called for, then the jury should decide as a matter of fact where the end of this line should be. We cannot say that either the edge of the swamp or the run is the objective swamp, but it should be submitted to the jury to ascertain, upon the evidence and under the instructions of the court, where the end of the third line or the fourth corner of the tract is, and then a line should be run from this corner according to the call of the deed to the first station. It will be seen, therefore, that the true location of this tract is to be determined by the same general principle which was applied in the case of the 64-acre tract. When the call is at all ambiguous or uncertain it is always a question of fact for the jury to decide what was meant, and to fix the boundaries according to what they may find from the evidence, under the law as given to them by the court, was the real intention of the parties to the deed." And in respect to the 64-acre tract—the court declared: "We still adhere to the doctrine so well stated by *Gaston, J.,* in *Brooks v. Britt, supra,* that where a swamp is called for, whether the run is in the boggy and sunken land, or the margin of such boggy and sunken land, is the call of the grant, depends 'upon facts fit to be proved and proper to be passed upon by the jury.'"

Testing the portions of the charge under consideration and the rulings in respect of the deleted portions of requested instructions, by the exceptions thereto, it appears that both the charge and the rulings are in substantial accord with the principles of law on which the case was decided on former appeal. These principles therefore constitute the law of the case,—and are binding on this appeal.

All other exceptions have been considered and in them no prejudicial error is made to appear.

Hence in the judgment on the verdict, we find

No error.

RULANE GAS COMPANY v. MONTGOMERY WARD & COMPANY, INC.

(Filed 14 December, 1949.)

1. Sales § 30—Evidence that seller represented that article was safe for use in particular manner when consciously ignorant of defect, held to raise implication of negligence.

Evidence that the retailer represented that the heater purchased by plaintiff could be safely converted for use with bottled gas by proper adjustment, that the adjustments were made and the heater installed by a service company, and that after fourteen months use there was an explosion, and that immediately thereafter it was ascertained that the automatic cut-off valve had failed in its function to cut off the gas after the pilot light had gone out, *is held* sufficient to be submitted to the jury on the issue of the retailer's negligence, there being evidence that the automatic cut-off valve was in substantially the same condition as when purchased, and there being no evidence to show that its usefulness would have been exhausted in that period.

2. Same: Negligence § 3—

The liability of a seller for resulting injuries when he authorizes an article to be used for a specified purpose, when by reason of defective construction injury may be reasonably apprehended from such use, rests upon general principles of negligence and does not arise out of the contract.

3. Sales § 17—

The seller of an article manufactured for it by another is subject to the same liability as the manufacturer if the article has been rendered potentially dangerous by defect in the construction of safety devices.

4. Negligence § 7—

Insulating negligence relates to proximate cause, and is an intervening act which could not have been reasonably foreseen and which becomes the efficient cause of the injury, and thus breaks the causal connection of the primary negligence.

5. Same: Sales § 30—

The evidence tended to show that a service man, upon being called to service a heater after the pilot light had gone out, struck a match after being warned not to do so, causing the gas, which had escaped because of a defect in the automatic cut-off valve, to explode. *Held:* The palpable negligence of the service man could not have been reasonably foreseen by the seller, and therefore his acts constitute intervening negligence insulating as a matter of law any negligence on the part of the seller in representing that the heater was safe for such use when it was consciously ignorant of the defective condition.

STACY, C. J., took no part in the consideration or decision of this case.

APPEAL by Montgomery Ward & Company from *Shuford, Special Judge,* April Term, 1949, of MECKLENBURG. Reversed.

Augusta E. Reis, administratrix of Louis A. W. Reis, deceased, instituted action against Rulane Gas Company to recover damages for the injury and death of her intestate, alleging negligence on the part of the Gas Company in the installation and service of an automatic gas heater, resulting in an explosion with fatal consequences.

Plaintiff Reis, in her complaint, alleged that the negligence of Rulane Gas Company in the respects set out proximately caused the injury complained of. The Rulane Gas Company then moved under G.S. 1-240 that Montgomery Ward & Company, from whom the heater was purchased, be made party defendant, and filed answer denying negligence on its part, and setting up a cross-action against Montgomery Ward & Company for contribution in the event it should be adjudged liable to the plaintiff. In its cross-complaint the Rulane Gas Company alleged that Montgomery Ward & Company was negligent in that under a representation of safety it sold to plaintiff's intestate an automatic gas hot water heater not adapted for use with bottled or other liquefied petroleum gas, and not equipped with proper automatic cut-off valve which would have stopped the flow of gas to the heater when the pilot light was out, and rendered an explosion impossible.

Defendant Montgomery Ward & Company, answering, admitted it sold to plaintiff's intestate a heater which had been manufactured for it by a named manufacturer, but denied that any part of the apparatus was defective when sold, or, if so, that the defect was one capable of detection by ordinary care, and further that any negligence in this respect was not the proximate cause of the explosion and consequent injury but was insulated by the subsequently operating negligence of the defendant Gas Company.

Upon issues submitted, the jury for their verdict found that the injury and death of plaintiff's intestate was caused by the negligence of defendant Rulane Gas Company, and also that this fatal injury was due to "the joint and concurring negligence of defendant Montgomery Ward & Company and the defendant Rulane Gas Company as alleged in the further defense and cross-action of the defendant Rulane Gas Company." Damages were assessed in total sum of $25,000. Judgment was rendered that plaintiff recover of defendant Rulane Gas Company $25,000, and that Rulane Gas Company have judgment over against defendant Montgomery Ward & Company for $12,500. The defendant Rulane Gas Company has paid the amount of the judgment to the plaintiff, and in order to preserve the lien of the judgment for the purpose of enforcing contribution against the defendant Montgomery Ward & Company has had the judgment transferred to a trustee for its benefit. Defendant Montgomery Ward & Company appealed.

Jones & Small for plaintiff, appellee.
Frank H. Kennedy for defendant, appellant.

DEVIN, J. The original plaintiff recovered in her action against Rulane Gas Company for the injury and wrongful death of her intestate, and the Gas Company has paid the plaintiff the amount of the judgment. However, Montgomery Ward & Company having been made party defendant, and the allegations in Rulane Gas Company's answer and cross-complaint of joint and concurring negligence having been sustained by the verdict and judgment below, Montgomery Ward & Company has appealed from the judgment decreeing contribution, and brings the case here for review.

We note that the case was instituted and tried below under the original title of *Reis v. Rulane Gas Company,* to which as additional defendant Montgomery Ward & Company was made party, and the issues raised by the pleadings were submitted to the court and jury. But the case has been brought here under the title of *Rulane Gas Company v. Montgomery Ward & Company.* While we think, in accord with the practice in this jurisdiction, the original title of a cause should be preserved throughout the litigation, we are not disposed in this case to require alteration of the style under which counsel have brought the case here. *Pascal v. Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534.

The liability of Rulane Gas Company to the original plaintiff Reis was established and the amount of recovery fixed by the verdict and judgment in the court below. The question now presented is the propriety of the judgment over against Montgomery Ward & Company for contribution as joint tort-feasor. The assignment of error chiefly debated by the appellant here was the denial of its motion for judgment of nonsuit on Rulane Gas Company's cross-action. It was urged that the evidence was insufficient to show negligence on the part of Montgomery Ward & Company proximately contributing to the injury for which recovery was had.

From the evidence offered, it was made to appear that the Rulane Gas Company was engaged in the business of selling the petroleum product known as bottled gas or propane gas and commonly called by the trade name rulane gas, and also in servicing automatic hot water heaters which used rulane gas as a heating agent. It seems three kinds of gases are used for this purpose, manufactured gas (from coal), natural gas, and rulane gas. The relative heating value of these gases per cubic foot as measured in British Thermal Units was 555 for manufactured gas, 950 to 1150 for natural gas, and approximately 2550 for rulane gas. Rulane gas is heavier than air, its specific gravity compared with air being in proportion of 150 to 100, while that of manufactured or natural gas is 65. So

that rulane gas escaping in an enclosed room sinks to the floor and remains undiluted until expelled. It also appears that rulane gas is highly inflammable and in quantity lends itself readily to explosion on ignition.

In May, 1946, Edwin A. Reis purchased from Montgomery Ward & Company for use in the home in which he and Louis A. W. Reis lived an automatic gas hot water heater under representation by the seller that it could be used "with safety" with rulane gas. When the heater was delivered crated, it was discovered that it bore a metal tag on which appeared these words, "Warning—This heater must not be used with bottled gas, butane or other liquefied petroleum gases." Upon observing this warning Reis called Montgomery Ward & Company, and, apparently being assured that the heater could be readily adjusted for the use of rulane gas, called in the Rulane Gas Company, who installed the heater, connected it with the tank, and put it in service. For use of rulane gas a smaller orifice or aperture for the flow of gas to the burner was installed. A small pilot light was kept burning at all times to ignite the flow of gas as regulated by a thermostat. The means of regulating and cutting off the flow of gas consisted of a manually operated cut-off valve, and a thermostat which regulated the flow of gas according to the temperature of the water in the tank in the heater and the amount of heat desired. This heater was also equipped with an automatic cut-off valve so arranged that when the pilot light went out it would automatically close and cut off the flow of gas into the heater. The heater was operated in the Reis home continuously and without accident until 17 July, 1947, when, not having been used that day, at 9 p.m., it was discovered the heater was cold and burner and pilot lights out. Louis A. W. Reis reported this fact to the Rulane Gas Company and apparently turned off the manually operated valve at that time. The Gas Company's service man did not arrive until 1 p.m. on the 18th when, with Mr. Reis, he descended into the basement, a small enclosed room, and disregarding a warning not to do so struck a match to light the heater. Instantly an explosion followed, inflicting such serious and painful burns that Reis died the next day, as also did the service man. Upon investigation immediately afterward it was found the manually operated cut-off valve was in "off" position, but the automatic safety valve was "on." There was evidence tending to show that the automatic safety valve, operated by means of a small bi-metal wire clip, was not working. The spring was apparently dead and would not snap back into closing position.

What caused the pilot light to become extinguished was a matter of conjecture, nor is it known when it went out, but it is apparent upon that happening the automatic cut-off valve failed to close and permitted an uninterrupted flow of rulane gas into the heater and thence into the room for some time prior to 9 p.m. July 17th, and that gas continued thereafter

to flow through the orifice of the pilot light, though in much smaller volume. Certainly enough gas had accumulated in the basement room to explode violently when ignited at 1 p.m. on the 18th.

If the automatic cut-off valve was in substantially the same condition in July, 1947, as when purchased, and there is no evidence to show its usefulness would have been exhausted within that period, then we think there was evidence of negligence on the part of Montgomery Ward & Company in selling the heater for use with rulane gas in the Reis home with assurance that it could be used with safety. While the heater was not an inherently dangerous instrumentality if properly constructed and handled, yet it was one capable of causing injury if the safety devices were defective and failed to operate. It may properly be said to have been imminently dangerous in that injury might reasonably have been apprehended when used for the purpose declared. Though the seller may not have had actual knowledge of any defect in the heater or controlling valves, the assurance of safety given when the seller was consciously ignorant whether the apparatus was defective or not when put to use, together with evidence of the discovery of a serious defect as the cause of a subsequent injury therefrom, would carry the implication of negligent failure of duty on the part of the seller. This is in accord with the holding of this Court in the recent case of *Dalrymple v. Sinkoe,* 230 N.C. 453, 53 S.E. 2d 437. There, in an opinion by *Justice Denny,* it was said: "If a seller, not knowing or caring whether his representations are true or false, goes so far as to represent that the article sold is safe for a certain use, while it is imminently dangerous when put to that use, he is liable for negligence. 46 A.J. 943. . . . A vendor who sells a stove that is equipped to burn one type of fuel and represents that it is suitable for use with a different kind of fuel, when in fact it is imminently dangerous when so used, is liable to the same extent as if he had sold a stove knowing it to be dangerously defective."

The duty is not created by contract but stems from the primary obligation resting upon civilized human beings not to cause injury to another through disregard of his safety. The general rule is that one who authorizes the use of a potentially dangerous instrumentality in such a manner or under such circumstances that it is likely to produce injury is held responsible for the natural and probable consequences of his act to any person injured who is not himself at fault. Known danger attendant upon a known use imposes obligation upon him who authorizes it. *Cashwell v. Bottling Works,* 174 N.C. 324, 93 S.E. 901; *Carter v. Towne,* 98 Mass. 567; *Carter v. Yardley & Co., Inc.,* 319 Mass. 92, 164 A.L.R. 559; *McPherson v. Buick Motor Co.,* 217 N.Y. 382; *Smith v. Peerless Glass Co.,* 259 N.Y. 292. An article is said to be imminently dangerous when, though it may safely be used for the purpose intended if properly con-

structed, yet by reason of defective construction a threatened injury may be reasonably apprehended from its use. 42 A.L.R. 1244 (note); 164 A.L.R. 589 (note); 46 A.J. (sup.) 20. And the seller of an article manufactured for it by another is subject to the same liability as the maker if the article has been rendered potentially dangerous by defect in the construction of safety devices. Restatement Law of Torts, secs. 395, 400.

It would seem then that there was some evidence to support the implication of negligence on the part of Montgomery Ward & Company, but a more difficult question follows. Was the original negligence of the seller of the heater in representing it could be used with safety with rulane gas the proximate cause of the injury suffered by plaintiff's intestate fourteen months later? Or was the seller's negligence in this respect insulated by the subsequent intervention of the active negligence of Rulane Gas Company's service man in striking a match, in spite of warning, in a gas filled room? As *Chief Justice Stacy* observed in *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808, "The application of the doctrine of insulating the negligence of one by the subsequent intervention of the active negligence of another, as a matter of law, is usually fraught with some knottiness. However, the principle is a wholesome one, and must be applied in proper instances." Is the instant case a proper one for its application? The doctrine of insulating negligence is after all an application of the definition of proximate cause (*Butner v. Spease, supra*). In the law of negligence proximate cause has been usually defined as that which in natural and continuous sequence, unbroken by any new and independent cause, produces the event and without which it would not have occurred. *Balcum v. Johnson,* 177 N.C. 213, 98 S.E. 532; *McIntyre v. Elevator Co.,* 230 N.C. 539, 54 S.E. 2d 45. And the test usually applied for the determination of the question whether the intervening act of another agency, which has become the efficient cause of an injury, shall be considered a new and independent cause breaking the sequence of events put in motion by the original negligence, is whether the intervening act and resulting injury is one which could reasonably have been foreseen. *Harton v. Telephone Co.,* 141 N.C. 455, 54 S E. 299; *Hinnant v. R. R.,* 202 N.C. 489, 163 S.E. 555. Foreseeability is an essential element of proximate cause. *Lee v. Upholstery Co.,* 227 N.C. 88, 40 S.E. 2d 688. Responsibility is imposed only for the injurious consequences of acts which could and should have been foreseen and by reasonable care and prudence avoided. *Lee v. Upholstery Co., supra.*

"Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause."

Powers v. Sternberg, 213 N.C. 41, 195 S.E. 88. In *Hinnant v. R. R.,* 202 N.C. 489, 163 S.E. 555, a passenger in an automobile was injured when the driver negligently drove into a freight train which had approached the crossing without signals. It was held that the negligence of the train engineer was insulated by that of the driver of the automobile since the "law did not impose upon the engineer the duty of foreseeing such negligent acts of the driver of the automobile."

To the same effect is the holding in *Herman v. R. R.,* 197 N.C. 718, 150 S.E. 361; *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446; *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; *Chinnis v. R. R.,* 219 N.C. 528, 14 S.E. 2d 400; *Warner v. Lazarus,* 229 N.C. 27, 47 S.E. 2d 496.

In *Kayser v. Jungbauer,* 217 Minn. 140 (146), it was said the act of an unauthorized person in actuating the starter of an automobile which had been parked in gear without taking ordinary precaution, was a superseding and intervening cause which broke the chain of causation between the act of leaving the car in gear and the injury to plaintiff. Restatement Torts, secs. 442, 447, 452.

Here we have evidence of the fact that notwithstanding Montgomery Ward & Company sold the heater with assurance it could be used with safety with rulane gas, the Rulane Gas Company, with knowledge from the tag on the heater itself that it was not originally designed for such use, made the changes and adjustments therefor, and installed the heater. After being in use continuously for fourteen months without accident, the pilot light went out, and, apparently due to defect in the safety cut-off valve, gas continued to flow into the heater and room. After notice that lights were out, the Gas Company delayed service fourteen hours, and in meantime failed to instruct the householder to cut off the gas to the pilot light. It appeared that the proper way to service a heater when the light has gone out and rulane gas has escaped into a closed room was to open the windows and doors and use a blower to dispel or dilute the gas before attempting to re-light. In this situation the service man of Rulane Gas Company with notice of the presence of gas in the room failed to observe the rule, and, after being warned not to do so, struck a match and caused the fatal explosion.

Could Montgomery Ward & Company under these circumstances reasonably have been expected to foresee that fourteen months after it sold the heater gas would be exploded as result of such palpable negligence on the part of the service employee sent by Rulane Gas Company to handle a situation involving escaping gas and an unlighted pilot?

After a careful examination of the record and the exhaustive briefs filed by counsel, we reach the conclusion that the evidence here is insufficient to warrant the holding that the negligence of Montgomery Ward & Company proximately contributed to the fatal injury for which recov-

ery has been had. The judgment holding Montgomery Ward & Company liable for contribution must be

Reversed.

STACY, C. J., took no part in the consideration or decision of this case.

PEGRAM-WEST, INC., v. WINSTON MUTUAL LIFE INSURANCE COMPANY.

(Filed 14 December, 1949.)

1. Frauds, Statute of, § 5—

An agreement by a mortgage company with a lumber dealer to pay for lumber to be used in the construction of a building on the mortgaged premises is an original promise which does not come within the purview of the statute of frauds, G.S. 22-1, and parol evidence of such agreement is competent.

2. Trial § 6—

The trial court has discretionary power to suggest to counsel that he read to the jury certain letters offered in evidence and to interrogate a witness in regard to a matter not theretofore made clear by the testimony, and such conduct will not be held for error on objection of the adverse party in the absence of abuse of discretion.

3. Same—

The trial judge is not required to read authority cited by counsel in support of a motion.

4. Same—

The action of the court in dictating renewal motion to nonsuit at the close of all the evidence cannot be held for prejudicial error on objection of movant.

5. Corporations § 20—

Defendant corporation was engaged in the business of loaning money on mortgage security. The evidence disclosed that it had taken a mortgage on certain property and had advanced funds that went into the construction of a building thereon, that it wanted the building completed to improve its security, and that under these circumstances its president agreed with plaintiff, a lumber dealer, to pay for lumber to be used in the completion of the building. *Held:* Nonsuit was properly denied in plaintiff's action to recover the balance due on the purchase price of the lumber so furnished.

6. Corporations § 6a (2)—

The president of a corporation is *ex vi termini* its head and, nothing else appearing, may act for it in the business in which it is authorized to engage.

7. Corporations § 19—

A corporation authorized to engage in the business of lending money on mortgage security has implied power to obligate itself for payment of materials to be used in the construction of a building on the mortgaged premises for the purpose of enhancing its security.

8. Corporations § 6a (2)—

The charter and by-laws and minutes of stockholders and directors' meetings are the best evidence of any restriction on the general authority of its president to act for the corporation, and parol testimony of such restrictions is incompetent.

9. Appeal and Error § 39f—

An immaterial error in the statement of contentions of the appellee will not be held for prejudicial error upon appellant's exception.

APPEAL by defendant from *Phillips, J.*, at 29 August, 1949, Term of GUILFORD—Greensboro Division.

Civil action to recover for lumber and materials allegedly furnished on original contract for delivery to another.

These facts are admitted in the pleadings, and are in evidence: Plaintiff is a corporation engaged in the sale of lumber and building materials, with its principal office and place of business in Greensboro, North Carolina. Defendant is a corporation engaged "in the business of issuing contracts and policies of insurance on life and other insurance," and "as a part of its business it makes loans secured by real estate in Guilford and other counties in the State of North Carolina"—its principal office being in Winston-Salem, N. C. And Elwood Dixon and wife are the owners of a certain tract or parcel of land in Guilford County, North Carolina, particularly described in the complaint in this action as being on Gorrell Street.

Plaintiff further alleges in its complaint, and upon the trial in Superior Court introduced evidence tending to show these additional facts: That Elwood Dixon, desiring to construct or being in process of constructing a building upon the land above described, approached the plaintiff, on or before 16 June, 1948, and requested it to extend to him a line of credit so he could purchase certain materials which he said he expected to use in the construction of the said building, but that plaintiff declined to extend any credit to him;

"5. That said Elwood Dixon advised plaintiff that defendant was making him a loan on the proposed building and that it would pay for all building materials used in construction thereof; that at the instance of said Dixon, plaintiff called defendant on the telephone at its office in Winston-Salem, North Carolina, and related to it the statements made by said Dixon; that plaintiff offered to extend credit to the defendant for

such material as said Dixon might require for the construction of the building aforesaid;

"6. That the defendant, acting by and through its president and manager, agreed to pay plaintiff for such material as was furnished for use in the building to be constructed upon the lands of said Dixon above described;

"7. That plaintiff furnished lumber and building material to the job and for use in the construction of the building upon the real estate above described," an itemized statement of which is set out, showing date, order number, description, sales tax and charges, the items bear date '1948,'—the first on '6-16' and the last '8-6,' totaling the amount of $1,843.57.

"8. That on or about the 13th day of July, 1948, plaintiff prepared and forwarded to the defendant a statement of all materials sold it and furnished to the said Dixon up to and including July 7, 1948; that as of said date the amount due plaintiff amounted to $1,478.57; that the 7th of August, 1948, defendant issued to the plaintiff its check in the sum of $1,478.57, and advised plaintiff that it would not longer be responsible for building materials furnished said Dixon; that between July 13, 1948, date of said statement, and August 7, 1948, date of denial of further liability, plaintiff sold further materials to said defendant and charged same to said account and delivered said material to the said Dixon, as set out in paragraph 6; said additional materials amounting to $364.74 . . .," for which, after demand by plaintiff, defendant has failed and refused to pay.

Howard E. West, as witness for plaintiff, testified in pertinent part: That in June, 1948, he was connected with plaintiff as officer in charge of the conduct of the business; that he talked with an officer of the Winston Mutual Life Insurance Company after he had a conversation with Dixon; that he placed a long distance call for George W. Hill, who was an officer of the Insurance Company. . . . And the witness recites the telephone conversation in this manner: "I told Mr. Hill that Elwood Dixon had been to our yard office and I in turn had been to the site of the building with Dixon and that Dixon had made application to us for the building materials on the building and that we had declined to extend credit to Dixon; that we were not financially able to extend to Dixon the line of credit requested. Mr. Hill asked me if we would furnish the materials to his company and extend a line of credit to them." To this the court interposed: "Q. To the Insurance Company?", to which the witness answered, "To the Insurance Company, which we elected to do," and continued by saying, "I also told him that it would be necessary that the material bills be paid by the 10th of the following month, which he agreed to do. . . . At that time the masonry walls of the building were

up and the amount of the materials was not mentioned . . . The conversation was in early June 1948, and in consequence of that agreement I delivered materials to the building on Gorrell Street. . . . I knew when I called up Winston Mutual Life Insurance Company that there was a construction loan in progress by virtue of what Dixon had told me and I expected payment for the materials furnished out of the proceeds of that loan . . . The terms, amount and condition of the loan were never given me."

On the other hand, defendant, answering, admits that plaintiff sent to it statement of materials in the sum of $1,478.58, and that it issued to plaintiff its check therefor, and that it advised plaintiff it would be responsible no longer for building materials furnished to Dixon; but denies other material allegations.

And defendant, for further defense, avers: That it did not promise and agree to answer for the debt, default or miscarriage of Elwood Dixon, but did tell plaintiff that if "Dixon should complete a building, then under construction on the . . . land described in the complaint . . . defendant would agree to lend to said Dixon the sum of $3,000, and that it is a practice of the defendant in making a loan on new construction to see that bills for material are paid out of the proceeds of the loan"; that the building has not been completed as per plans and specifications shown to defendant, but that defendant granted a loan in the amount specified, and out of it paid to plaintiff the total amount of the bill presented to defendant for materials furnished.

Defendant further pleaded the statute of frauds, G.S. 22-1, as a bar to right of plaintiff to recover in this action "upon any alleged agreement made by telephone."

And on the trial in Superior Court, George W. Hill, as witness for defendant, testified in pertinent part: "I am President of the Winston Mutual Life Insurance Company. Sometime in June 1948 I received a telephone call from Greensboro; the person speaking to me represented himself to be Pegram-West. . . . He mentioned an application being made to him for materials by one Elwood Dixon. I told him we had granted Mr Dixon a loan of $3000 and out of that amount we would take care of his bills so far as that $3000 would last. So that ended our conversation . . . Prior to the application of Dixon for the additional $3000 loan, my company had made a loan to Dixon already and he was indebted to the company at that time in the sum of $5000 or $6000 . . . All of the additional loan in the sum of $3000 made to Dixon was absolutely paid out for Dixon on the bills rendered to us and there was no money left in the hands of the Winston Mutual Life Insurance Company belonging to Dixon as a result of any loan whatsoever. I did not make any request of Mr. West over the phone to furnish any material to the

Winston Mutual Life Insurance Company for the purpose of building a building for Elwood Dixon . . . We have never authorized them to extend any credit to Dixon." And the witness being interrogated by the court, as to the proceeds of the $3000 loan, testified that the company kept the money and paid Dixon's bills. And the witness further testifying on cross-examination, said: "Mr. West talked to me about this matter over the phone only once, and at that time . . . the deed of trust was already on record and . . . we had already advanced some funds that went into that building. We wanted the building completed." Immediately following the witness was asked the question, "So that you would have a good loan on a good piece of property, you were anxious that the building be completed?", to which he answered, "Yes, sir. We wanted it completed."

When the parties rested their respective cases, the court submitted the case to the jury upon these issues:

"1. Did the defendant contract and agree with the plaintiff to pay the plaintiff for such material as was furnished by the plaintiff for use in the construction of a building upon the lands described in the complaint?

"2. What amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered the first issue "Yes," and the second "$364.74, plus interest at 6%."

Thereupon, and in accordance therewith, the court rendered judgment in favor of plaintiff and against defendant.

Defendant appeals to Supreme Court and assigns error.

Hoyle & Hoyle for plaintiff, appellee.

W. Avery Jones for defendant, appellant.

WINBORNE, J. The errors assigned by defendant, and set forth in the record as required by the rules of this Court are nine in number. And while prejudicial error is not made to appear, we consider them in proper groups.

I. Assignments of error Nos. 1, 2 and 4, relating to exceptions 1, 2 and 4, as stated by appellant, may be combined in this manner: That the court committed error (1) "in permitting the introduction of oral testimony to prove the terms of the contract, in variance with that set up in the complaint,—the statute of frauds having been specially pleaded"; (2) "in admiting testimony of a conversation with G. W Hill completely at variance with the allegations of the complaint"; and (4) "in denying the motion of the defendant to strike out the oral testimony of the plaintiff as to the terms of the contract."

Patently, these assignments of error are based upon misapprehension that plaintiff is seeking to recover upon a "special promise to answer the

debt, default or miscarriage of another," which is required by statute to be in writing and signed. G.S. 22-1. Such is not the case. The cause of action alleged in the complaint is based upon an original promise of defendant to pay for materials to be, and which were later furnished by plaintiff for use in completing the construction of a building on the land of Elwood Dixon, which, if true, does not come within the provisions of the statute, G.S. 22-1, and is not required to be in writing and signed. See *Peele v. Powell,* 156 N.C. 553, 73 S.E. 234, on rehearing 161 N.C. 50, 76 S.E. 398

Hence the testimony to which exceptions under consideration relate is pertinent to such alleged original promise of defendant. True it is, defendant denies making any such promise, and avers, and on the trial offered testimony tending to show its contention as to what was the agreement with plaintiff in respect to furnishing the materials. Thus an issue of fact arose to be determined by the jury. See *Farmers Federation, Inc., v. Morris,* 223 N.C. 467, 27 S.E. 2d 80. And evidence in support of the respective allegations of the parties, and pertinent to the issue, was admissible.

II. Assignments of error Nos. 3 and 7, unsupported by exceptions, but nevertheless considered, are these: That the court committed prejudicial error (1) "by suggesting of its own motion that counsel for plaintiff offer some letters in evidence and directing him to read them to the jury," and (2) "by entering into cross-examination of defendant's witness of his own motion."

As to the first, the record shows that in the course of the examination of a plaintiff's witness, two letters from defendant to plaintiff were identified, and, upon counsel for plaintiff offering the letters in evidence, the court merely stated "Suppose you read them to the jury." And as to the second, the court interrogated defendant's witness, its President, George W. Hill, as to whether the proceeds of the $3000 loan referred to was delivered to Dixon, or kept by defendant and disbursed by it on Dixon's credit. And the interrogation ended when the witness finally stated that the company kept the money and paid Dixon's bills,—a fact which the testimony theretofore given had not made clear.

Such matters are addressed to the discretion of the presiding judge, and, in the absence of abuse of discretion, his rulings will not be disturbed on appeal. Here abuse of discretion does not appear.

III. Assignments of error Nos. 5 and 8, purporting to cover exceptions 5 and 8, are these: "That the court committed prejudicial error" (1) "in refusing to hear the defendant's argument and citations of law in support of its motion to dismiss as of nonsuit at the close of the plaintiff's evidence and bluntly stating to counsel for defendant, 'I don't care to hear them, I am familiar with the law' "; and (2) "in refusing to

allow counsel for the defendant to make and/or argue his motions at the close of all the evidence, but briskly made such motions as he saw fit and promptly overruled his own motions."

As to the first, the record shows that when plaintiff rested its case, the court inquired "Any evidence for the defendant?", whereupon counsel for defendant stated "We wish to make a motion, your Honor, in the case at this time." And upon inquiry by the court as to "What is your motion?", counsel for defendant stated: "Our motion is to dismiss this action as of nonsuit, because . . .,"—followed by statement of counsel for defendant at some length. Whereupon the court inquired, "Is that all?", to which counsel for defendant replied: "I have some citations here if your Honor cares to hear them." Thereupon the court said: "I don't care to hear them. I am familiar with the law. Overruled. Exception." No doubt the citation of authorities is often helpful to the presiding judge, but we know of no rule of practice that requires the judge to read them.

And as to the second, at the close of all the evidence, counsel for defendant stated, "I want to make a motion." Whereupon the court stated: "Yes, sir, at the close of all the evidence defendant renews its motion for judgment of nonsuit and renews other motion made at the close of plaintiff's evidence. Motions overruled. Exceptions."

The motion usually made at the close of the evidence is for judgment as of nonsuit, and there is nothing out of the ordinary for the judge to dictate the motion and the ruling on the motion. And the record fails to show that counsel for defendant asked to make any other motion.

So, as we read the record, while it shows exceptions to the denial of motions for nonsuit, the assignments of error are restricted to matters beside the point.

Nevertheless, if the assignments of error were to the actual rulings of the court on the motions for judgment as of nonsuit, the evidence as to the alleged transaction, and its attendant circumstances, taken in the light most favorable to plaintiff is abundantly sufficient to take the case to the jury on the issues raised by the pleadings.

The defendant, a corporation authorized to make loans on real estate in Guilford County, North Carolina, had already advanced some funds that went into the construction of the building being erected on the land of Elwood Dixon located in said county, and had a deed of trust on the land to secure the loan, and wanted the building completed, so that, as its president testified, it would have a good loan on a good piece of property. More materials were required. Plaintiff had the materials, but would not let Dixon have them. Under these circumstances plaintiff alleges and offered evidence tending to show that the president of defendant corporation agreed that defendant would pay plaintiff for such materials as were furnished for use in the building being constructed on the Dixon land.

The president of a corporation is *ex vi termini* its head and general agent, and, nothing else appearing, may act for it in the business in which it is authorized to engage. See *Phillips v. Land Co.,* 176 N.C. 514, 97 S.E. 417; *Trust Co. v. Transit Lines,* 198 N.C. 675, 153 S.E. 158; *Warren v. Bottling Co.,* 204 N.C. 288, 168 S.E. 226; *Mills v. Mills,* 230 N.C. 286, 52 S.E. 2d 915. See also *Berry v. R. R.,* 155 N.C. 287, 71 S.E. 322.

Moreover it is manifest from the evidence that the transaction under consideration was a loan made by the defendant within the scope of its authorized business. The security for a loan is incidental to, and forms a part of it.

And "it is a recognized rule that a corporation is not restricted to the exercise of the powers expressly conferred upon it by its charter, but has the implied or incidental power to do whatever is reasonably necessary to effectuate the powers expressly granted and to accomplish the purposes for which it was formed, unless the particular act sought to be done is prohibited by law or by its charter," 13 Am. Jur. 772, Corporations 740.

Hence plaintiff, having offered evidence tending to show that defendant, through its president, made the original promise in suit, under the circumstances the evidence tends to show, and defendant having denied the promise alleged by plaintiff, the issue of fact was properly submitted to the jury. *Farmers Federation, Inc., v. Morris, supra.*

IV. Assignment of error No. 6, based on exception No. 6, is stated as follows: "That the court committed error in excluding the testimony of G. W. Hill as to his authority or lack of authority to bind his company under a contract to buy materials for use and benefit of a third person." In respect of this exception, it is sufficient to say that some affirmative declaration in the charter or by-laws of the corporation, or affirmative action by the stockholders or directors of the corporation in meetings duly called and held, would be required to restrict the general authority vested in the president to act for the corporation. And the charter and by-laws, and minutes of stockholders and directors meetings are the best evidence as to what they contain. Their contents may not be proved by parol evidence.

V. Assignment of error No. 9 is "that the court committed prejudicial error in charging the jury 'that the plaintiff knew this man Dixon and knew that Dixon was not a good risk; that the plaintiff through its agents refused the credit to Dixon knowing that he was not a good risk,' and refusing to correct the same when called to its attention." The record shows that the portions embraced within the inside quotations are separate parts of a paragraph in which the court was stating a contention of plaintiff. It is also noted that when attention was called to the evidence of plaintiff as to its reason for not extending credit to Dixon, the court

said to the jury: "Well, they said that, too. The witness testified that his company was not able to carry open accounts, especially one with Dixon, and that he also did not consider him a good risk. You will remember what they said about that." If it be conceded that the statement of the contention did not coincide exactly with the testimony, there is no contention that the witness did not testify that plaintiff declined to extend credit to Dixon. The reason plaintiff assigned for its action is immaterial. Hence, if there be error in the ruling of the court, it is harmless.

After due consideration to all assignments of error set out in the record on this appeal, we find

No error.

MARY LEONA JONES v. OTIS ELEVATOR COMPANY, A CORPORATION.

(Filed 14 December, 1949.)

1. Master and Servant § 41—

Where neither the employer nor its insurance carrier has brought action against the third person tort-feasor within six months from the date of the injury, the injured employee may maintain such action in her own name. G.S. 97-10.

2. Same—

Neither the employer nor its insurance carrier are proper or necessary parties to an action instituted by the injured employee against the third person tort-feasor more than six months from the date of the injury, no action having been instituted by the employer or its insurance carrier.

3. Torts § 5—

Where plaintiff alleges that the negligence of defendant was the proximate cause or one of the proximate causes of her injury, such defendant may not maintain that another party is necessary to be joined on its contention that the negligence of such other party contributed to the injury, since even so, plaintiff would be entitled to sue either joint tort-feasor separately.

4. Courts § 15—

In an action to recover for negligent injury sustained in another state the *lex fori* governs the procedure but the *lex loci* determines the substantive rights of the parties.

5. Contracts § 19: Negligence § 15—

Where the subject matter of a contract is a dangerous instrumentality or the breach of the contract involves imminent danger to the lives and property of others, a person injured as a result of a breach of the contract may sue the party whose breach resulted in his injury even though the

injured person is not a party or privy to the contract, since the action is bottomed on negligence constituting a breach of duty imposed by law and not upon breach of the contract.

6. Same—

While an elevator is not necessarily an inherently dangerous instrumentality, it becomes imminently dangerous unless kept in proper repair, and therefore a party entitled to use an elevator in a building, who is injured by reason of the failure of a safety device devised to make it impossible to open a door to the elevator shaft unless the cage of the elevator is at that floor, may maintain an action against the party who is under continuing contractual duty to the owner of the building to maintain the elevator in proper repair.

APPEAL by defendant from *Williams, J.*, at August Term, 1949, of LENOIR.

This is an action instituted by the plaintiff on 26 March, 1949, to recover for injuries which she sustained as the result of falling in an elevator shaft in Memorial Hall, Richmond, Va., on 28 March, 1948, which injuries she alleges were sustained by reason of the failure of the defendant to keep the elevator in said building in proper repair, in accordance with the terms of a written contract between the defendant and the Medical College of Virginia, Hospital Division (hereinafter called Medical College of Virginia), the owner of said Memorial Hall.

It is further alleged that the plaintiff at the time of her injury was an employee of the Goldsboro Hospital, Inc., and had been assigned to duty in the Medical College of Virginia for further training; that under the terms and provisions of her contract of employment with the Goldsboro Hospital, Inc., on 28 March, 1948, it was the duty of the Goldsboro Hospital, Inc., to provide her with living quarters, and, through the Medical College of Virginia, it did provide the plaintiff with living quarters in the building known as Memorial Hall, 1201 East Broad Street, Richmond, Va.

It is alleged that the defendant, on 28 May, 1945, entered into a contract with the Medical College of Virginia, which contract was in effect at the time of plaintiff's injury, and in which the defendant obligated itself to use all reasonable care to maintain the passenger elevator in Memorial Hall in proper and safe operating condition, to inspect it weekly; and to examine, lubricate, adjust, and if in its judgment conditions warranted, repair or replace the following accessory equipment: Selectors, electric operators, door closers, electric interlocks, car doors, car gates, door hangers, etc.

The plaintiff alleges that by reason of the improper maintenance of the elevator by the defendant, she was lured into the open elevator shaft in a poorly lighted hall on the third floor of said building, that she fell to the first floor on top of the elevator and received serious and permanent

injuries; and she further alleges, among other things, that the defendant, in violation of its contract so maintained "the said elevator that the door closures, electric inter-locks and other apparati (apparatus) forming a part of the elevator unit would not operate or perform the function for which such units were designed and installed, and so as to cause the elevator cage and/or carriage to move and/or be moved from one floor in the said building to the other while the door to the elevator well was open, to enable one to open the door to the elevator well when the cage or carriage was not at that floor."

It is also alleged that the plaintiff has filed a claim with the N. C. Industrial Commission, seeking to recover compensation under the provisions of the N. C. Workmen's Compensation Act, as an employee of the Goldsboro Hospital, Inc., but no award has been made, neither has the employer or its carrier, The Travelers Insurance Company, admitted or accepted liability for the injuries sustained by her, and that more than six months has expired since the date of her injury, and that this action is brought on behalf of plaintiff, her employer and its insurance carrier.

The defendant demurred to the complaint on the following grounds:

1. That it appears on the face of the complaint that there is a defect of parties plaintiff and defendant, in that: (a) The Goldsboro Hospital, Inc., and its carrier, Travelers Insurance Company, are real parties in interest and are proper and necessary parties plaintiff in this action; (b) The Medical College of Virginia is a proper and necessary party defendant.

2. That the complaint does not state facts sufficient to constitute a cause of action against the defendant, Otis Elevator Company for the following reasons: (a) That the plaintiff alleges a contract between the Otis Elevator Company and the Medical College of Virginia, which is not a party to the action, and no privity of contract exists between the plaintiff and the parties to said contract; (b) the contract referred to herein, creates no duty on the part of this defendant to the plaintiff, since she is a third party, and no privity of contract exists between them.

3. That it appears on the face of the complaint that the court has no jurisdiction of the subject matter of this action, in that the N. C. Industrial Commission has exclusive jurisdiction thereof.

The demurrer was overruled, and the defendant appeals and assigns error.

J. A. Jones, Weston O. Reed, and Thomas B. Griffin for plaintiff.

Whitaker & Jeffress for defendant.

DENNY, J. We shall first consider the challenge to the jurisdiction of the court. It is contended that the N. C. Industrial Commission has

exclusive jurisdiction of this cause. The contention cannot be upheld in light of the provisions of our Workmens' Compensation Act and the facts as alleged in plaintiff's complaint.

It is provided in G.S. 97-10 that the rights and remedies granted to an employee, where he and his employer have accepted the provisions of the Workmen's Compensation Act, shall exclude all other rights and remedies of such employee, as against his employer at common law, or otherwise, on account of any injury. However, the statute further provides "that in any case where such employee . . . may have a right to recover damages for such injury . . . from any person other than the employer, compensation shall be paid in accordance with the provisions of this chapter: Provided, further, that after the industrial commission shall have issued an award, or the employer or his carrier has admitted liability in writing and filed same with the industrial commission, the employer or his carrier shall have the exclusive right to commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death, . . .If, however, the employer does not commence such action within six months from the date of such injury or death, the employee, or his personal representative, shall thereafter have the right to bring the action in his own name, and any amount recovered shall be paid in the same manner as if the employer had brought the action." *Peterson v. McManus,* 208 N.C. 802, 182 S.E. 483; *Ikerd v. R. R.,* 209 N.C. 270, 183 S.E. 402, 106 A.L.R. 1061n; *Mack v. Marshall Field & Co.,* 217 N.C. 55, 6 S.E. 2d 889; *Sayles v. Loftin,* 217 N.C. 674, 9 S.E. 2d 393; *Whitehead & Anderson, Inc., v. Branch,* 220 N.C. 507, 17 S.E. 2d 637; *Eledge v. Light Co.,* 230 N.C. 584, 55 S.E. 2d 179.

The plaintiff was injured on 28 March, 1948, and at the time of the institution of this action, on 26 March, 1949, more than six months having expired from the date of her injury, she was authorized by the statute to institute an action against any third party or parties who in her opinion contributed to her injury, and the defendant is in no wise affected by our Workmen's Compensation Act. It is an outsider, a third party, and is given no rights nor is it relieved of any liability under its provisions. *Hinson v. Davis,* 220 N.C. 380, 17 S.E. 2d 348.

Likewise, on the question of parties, since it appears on the face of the complaint, that no award has been made by the N. C. Industrial Commission, and neither the employer nor its carrier has admitted or accepted liability, they are neither necessary nor proper parties. The employer or his carrier becomes subrogated to the rights of the employee, under the provisions of our Workmen's Compensation Act, only after the payment of an award to the injured employee, or his personal representative, or where the employer or his carrier has admitted liability in writing and

filed same with the N. C. Industrial Commission, G.S. 97-10. Moreover, when the employer or his carrier is subrogated to the rights of an employee, the action may be brought in the name of the injured employee or his personal representative, and neither the employer nor his insurance carrier is a necessary or proper party to the action. *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613; *Eledge v. Light Co., supra.*

The defendant also contends the Medical College of Virginia is a necessary and proper party to this action. We do not agree with this contention. The plaintiff alleges that her injury was proximately caused by the negligence of the defendant. The burden is upon her to prove her allegations in this respect, and she may do so by proving that the negligence of the defendant was the proximate cause, or one of the proximate causes, of her injury. And it makes no difference, in so far as her right to maintain this action is concerned, whether or not the negligence of the Medical College of Virginia and the negligence of the defendant jointly and severally produced her injury. For where negligence is joint and several, the injured party may elect to sue either of the joint tort-feasors separately or any or all of them together. *Hough v. R. R.*, 144 N.C. 692, 57 S.E. 469; *Hipp v. Farrell,* 169 N.C. 551, 86 S.E. 570; *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126; *Godfrey v. Power Co.*, 223 N.C. 647, 27 S.E. 2d 736.

The final question for determination is whether or not the complaint states a cause of action against the defendant.

The *lex fori* governs the procedure in this cause of action; but the *lex loci* determines the substantive rights of the parties. Hence, their substantive rights are governed by the law of Virginia. *Charnock v. Taylor, supra.*

The demurrer was interposed on the ground that no privity of contract exists between this plaintiff and the defendant. Therefore, it contends the action is not maintainable. We do not concur in this view. Ordinarily an action in tort, founded upon a breach of contract, cannot be maintained by one who is not a party or privy to the contract. 12 Am. Jur. 818. But the general rule is subject to certain well recognized exceptions. And among the exceptions is where a dangerous instrumentality is involved, or where the act complained of is imminently dangerous to the lives and property of others. In such case the injured party, whether a party or privy to the contract or not, may maintain an action against the party whose breach of the contract resulted in his injury. Even so, such action is not bottomed on the breach of the contract, but on the alleged negligence committed in its breach, which negligence constitutes a breach of duty imposed by law. 12 Am. Jur. 820, *et seq.*

It is said in 45 C.J. 650: "The law may impose duties additional to those specified in a contract or independent of it, and one may owe two

distinct duties in respect of the same thing, one of a special character to a particular individual, growing out of special relation to him, and another of a general character to those who would necessarily be exposed to risks or danger or loss through the negligent discharge of such duty. Privity of contract is not necessary where the duty which was breached, although connected with the subject matter of a contract, was not created by the contract, as in a case where one who has been employed to perform certain work is guilty of such negligence in connection with the performance thereof as to cause injury to a person other than his employer, or where the thing dealt with is inherently dangerous."

Likewise, in 38 Am. Jur. 664, it is said: "No privity of contract is essential to support liability for negligence in respect of acts or instrumentalities which are imminently dangerous. The liability in such instances is independent of privity of contract and depends merely on the duty of every man to act so as not to injure the persons or property of others." Cooley on Torts, Vol. 3, p. 498; *Nat. Savings Bank v. Ward,* 100 U.S. 195, 25 L. Ed. 621; *Goodlander Mill Co. v. Standard Oil Co.* (C.C.A. 8th) 63 F. 400, 27 L.R.A. 583; *American Oil Co. v. Nichols,* 156 Va. 1, 157 S.E. 754; *Standard Oil Co. v. Wakefield,* 102 Va. 824, 47 S.E. 830, 66 L.R.A. 792; *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916 F. 696; *Devlin v. Smith,* 89 N.Y. 470, 42 Am. Rep. 311.

In the case of *Standard Oil Co. v. Wakefield's Admr., supra,* the Standard Oil Company shipped to the City of Richmond a car of naphtha, for use in making gas. In unloading the car, owing to a defective valve the flow could not be regulated, the naphtha escaped, ran into a sewer near the gas works, was ignited and killed an employee of the City who was helping to unload the car. The Oil Company contended, as the defendant does here, that since no contractual relationship existed between it and the plaintiff's intestate, it did not owe to him the duty of keeping the valve in the car in a reasonably safe condition, and was not, therefore, guilty of any negligence as to him. But the Court said: "It seems to be a well-settled rule of the common law that a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured who is not himself at fault. The liability does not depend upon privity of contract between the parties to the action, but on the duty of every man to so use his own property as not to injure the persons or property of others." This decision was approved and followed in *American Oil Co. v. Nichols, supra.*

The facts in *Overstreet v. Security Storage & Safe Deposit Co.*, 148 Va. 306, 138 S.E. 552, relied on by the appellant, are distinguishable from those alleged in the instant case.

We understand the elevator involved in this action was what is known as an automatic electrically operated elevator, and was equipped with various safety devices, including electric interlocks. Such safety devices, when in proper condition, make it impossible, in its ordinary use, to open a door to the elevator shaft, unless the cage of the elevator is at the floor where such door is located. *Hood v. Mitchell,* 206 N.C. 156, 173 S.E. 61; *Jacobi v. Builder's Realty Co.,* 174 Cal. 708, 164 Pac. 394, 69 L.R.A. 1917-E, 696. And while an elevator is not necessarily an inherently dangerous instrumentality, it certainly becomes imminently dangerous unless it is kept in proper repair. The defendant obligated itself to keep the elevator in question in safe operating condition and to inspect it weekly. The obligation was a continuing one. It had been receiving a substantial monthly consideration for this maintenance and inspection service since 1 August, 1945. It is now in no position, under the facts alleged, to deny that it owed any legal duty to the plaintiff or others quartered in Memorial Hall by the Medical College of Virginia. Apparently the elevator was being maintained for the use of students and others, either attending or employed by the Medical College of Virginia, who were quartered in this dormitory.

Whether or not the plaintiff can prove her allegations of negligence against the defendant, is a matter with which we are not concerned on this appeal. But, on the record before us, we think his Honor was correct in overruling the demurrer to the jurisdiction of the court, for lack of necessary and proper parties, and on the ground that the complaint fails to state a cause of action.

The judgment of the court below is

Affirmed.

THE MOSES H. CONE MEMORIAL HOSPITAL v. BERNARD M. CONE, ETTA CONE, HERMAN CONE, BENJAMIN CONE, CAESAR CONE, II, EDWARD T. CONE, MRS. EDNA LONG LIGHTENFELS, MRS. DOROTHY LONG BERNEY, CLARENCE N. CONE, II, MRS. ISABEL C. LEVY, SYDNEY M. CONE, JR., MAXWELL CONE, JAMIE CARROLL CONE AND ALAN FRANK CONE, INFANTS; MRS. MARIAN J. GLASS, MOUNT PLEASANT, INC., THE NATIONAL JEWISH HOSPITAL FOR CONSUMPTIVES, AND HARRY McMULLAN, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA.

(Filed 14 December, 1949.)

1. Trusts § 20b—

A court of equity has inherent power to authorize to be done whatever is necessary to preserve a trust and to accomplish its objective.

2. Same—

When condemnation of right of way for a Federal scenic highway through lands held in trust for a public memorial park is imminent, a court of equity has authority to empower the trustee to convey the park land to the United States Government upon its agreement to develop and maintain the property under the name designated in the trust and in substantial accord with all the terms and conditions thereof, with minor modifications incidental to the establishment of a scenic highway through the park, with further provision for reverter to the trustee upon failure of such use, such conveyance being necessary under the circumstances for the preservation of the trust and the accomplishment of its objective.

3. Trusts § 9a—

Where a trust indenture is to a trustee, its successors and assigns, the indenture contemplates the possible appointment of a substitute trustee by conveyance, and the trustee has the power to convey the property to another for the administration of the trust upon the conditions set forth in the indenture when necessary for the preservation of the trust and the accomplishment of its objective.

APPEALS by plaintiff and defendant guardian *ad litem* from *Phillips, J.*, August Term 1949, GUILFORD.

Civil action instituted under the declaratory judgment act.

The plaintiff is the trustee under three interrelated indentures of trust and in that capacity requests construction of these three trust indentures and a declaration of its rights and obligations as trustee thereunder, particularly in respect to its right to convey subject to the conditions of the trust. The defendants comprise all persons and corporations having any vested or contingent interest in the property or the trust.

In May 1911, Bertha L. Cone executed and delivered to the plaintiff, a domestic charitable corporation, three indentures herein referred to as Indentures A, B, and C.

Under Indenture A, said grantor, widow of Moses H. Cone, conveyed to the plaintiff, in trust, a tract of land located in Watauga County. The conveyance was in fee and provides that the plaintiff herein, as trustee, shall hold the property upon certain express conditions which may be summarized as follows:

(1) Plaintiff shall lay off a plot of land surrounding the grave of Moses H. Cone located on said property as a burial ground for said deceased and the grantor and shall perpetually maintain this burial ground with the right of ingress and egress for the friends and relatives of the grantor and her deceased husband.

(2) All the property except the burial ground so laid off shall be maintained as a public park for the free use and enjoyment of all persons who may desire to resort thereto, to be known as the Moses H. Cone Memorial Park.

(3) The plaintiff shall expend in maintaining said park and burial ground and in keeping open and maintaining the several roads, drives, and ways as they then existed on the land the sum of $10,000 per annum.

It is further provided that should the plaintiff, or its successors or assigns, violate any of the conditions of this indenture, the land conveyed shall be forfeited by the plaintiff and shall revert to the heirs of Moses H. Cone, deceased.

Under Indenture B, Bertha L. Cone conveyed to plaintiff, in trust, a tract of land located in Guilford County, N. C., as a site for a hospital and made certain stipulations for the use of the property.

Under Indenture C, the same grantor conveyed to the plaintiff, in trust, certain income-producing property as a fund for the implementation of the trusts created under Indentures A and B and to provide the necessary funds therefor. This indenture provides that if plaintiff shall fail, substantially and in good faith, to comply with all the conditions, limitations, and reservations contained in Indentures A, B, and C, such failure shall work a forfeiture and the property conveyed shall revert to the two charitable organizations therein named.

The United States of America, acting through the National Park Service, is now developing the Blue Ridge Parkway, a scenic highway linking the Shenandoah National Park with the Great Smoky Mountains National Park. The proposed route of this highway traverses and approximately bisects the lands in Watauga County dedicated under Indenture A as a public park to be known as the Moses H. Cone Memorial Park. The State of North Carolina is under contract to provide, either by purchase or condemnation, the right of way and other lands necessary for the construction of that portion of said scenic highway lying within this State. It will be necessary, therefore, unless other arrangements are made, for the State of North Carolina to condemn a substantial part of

said park and the right of way thus appropriated will bisect the park land. The condemnation and appropriation of this land to the use of said parkway will render it practically impossible for the plaintiff to maintain said parkway, the roads, drives, and paths therein, in the manner contemplated by the trust agreement.

To overcome this difficulty the United States Government, through the National Park Service, has agreed that upon the conveyance of said park land to it, the United States will construct the scenic highway upon the proposed right of way across the park property and develop and maintain all of the remaining parts of the park property as a national park under the name designated in said trust indenture and in substantial accord with all of the terms and conditions set forth in Indenture A. It likewise agrees to do substantial repair and restoration work upon the park property so as to meet the recreational needs of the area.

Pursuant to this agreement plaintiff has executed and delivered to the National Park Service a deed, referred to as Indenture D, in compliance with said agreement. Under this deed, the United States Government assumes the maintenance of the Moses H. Cone Memorial Park, as such, and agrees to comply with the conditions of the trust and to make the proposed repairs and restorations. The indenture provides for some slight changes in the conditions in respect to the roads, drives, and paths, and, of course, dedicates the highway right of way to use as a part of the scenic highway. It is expressly provided in the deed that a failure of the grantee to comply with the stipulations and conditions therein and as contained in Indenture A "shall work a forfeiture of the estate hereby conveyed, and the property hereby conveyed shall immediately thereupon revert to the MOSES H. CONE MEMORIAL HOSPITAL, without the necessity for exercise of a right of entry . . . and provided further that the portion of the property hereby conveyed embraced in the said right-of-way shall also thereafter revert to the MOSES H. CONE MEMORIAL HOSPITAL if and whenever the said strip of land shall cease to be used by the UNITED STATES OF AMERICA as a motor-road."

When the cause came on to be heard in the court below, the court, after finding the facts, concluded: (1) that all persons who are "the heirs of Moses H. Cone, deceased," as that group would be constituted at the present time, are parties defendant in this action and properly before and subject to the jurisdiction of the court; (2) that the interests attempted to be created in "the heirs of Moses H. Cone, deceased," under Indenture A are void in their inception under the rule against perpetuities; (3) that the plaintiff, therefore, has an absolute and indefeasible fee title as trustee to the Moses H. Cone Memorial Park property and that the plaintiff shall in no event forfeit the said property; and (4) that the plaintiff is empowered and authorized under the terms of its charter and of its three

controlling trust indentures (Indentures A, B, and C) to make Indenture D effective, and that said Indenture D (the proposed conveyance) shall become effective in accordance with its own terms and conditions.

It thereupon adjudged that the plaintiff is fully authorized and empowered to execute the proposed conveyance to the United States of America on the conditions and stipulations therein contained and to contribute $10,000 per year to be expended exclusively for the maintenance or construction of said memorial park and that said conveyance in no way constitutes a violation or breach of the terms and conditions of Indenture A. It was further adjudged that said conveyance "shall become effective in accordance with its own terms and conditions." The plaintiff, at the suggestion of the court, appealed. The defendant guardian *ad litem* also appealed.

Falk, Carruthers & Roth for plaintiff appellant.

Sidney J. Stern, Jr., guardian ad litem.

Harry McMullan, Attorney-General of North Carolina.

R. Brookes Peters, general counsel, State Highway & Public Works Commission.

BARNHILL, J. The right of the State of North Carolina to condemn a right of way across the memorial park property for use by the National Park Service for maintaining a scenic highway is unquestioned. Should the plaintiff sit idly by and suffer this to be done without any effort to preserve the trust, the maintenance by it of the land described in Indenture A as a memorial park would be seriously endangered. The dominant right of the government would so impede the plaintiff that it would find it extremely difficult, if not impossible, to comply, substantially and in good faith, with the conditions of the trust indenture so as to accomplish its prime objective. Seeking to avoid this result and prevent the defeat of the trust objective, it procured from the National Park Service, an agency of the United States Government, the agreement which is set forth in the proposed conveyance. This agreement, in the form of a deed of conveyance, assures the continued maintenance of the property as a memorial park for the use of the public in substantial compliance with the terms of the trust indenture and in a manner equal, if not superior, to that which would be possible by the trustee. Thus the objective of the trust is preserved and its accomplishment is assured.

That a court of equity, under the circumstances herein disclosed, has the power to authorize and direct the proposed conveyance, the very purpose of which is the preservation of the trust itself, cannot be successfully challenged. *Cutter v. Trust Co.*, 213 N.C. 686, 197 S.E. 542;

Penick v. Bank, 218 N.C. 686, 12 S.E. 2d 253; *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203.

"Courts of equity have general, inherent, exclusive supervisory jurisdiction over trusts and the administration thereof. In the exercise of that power they may authorize whatever is necessary to be done to preserve a trust from destruction. The prime consideration is the necessity for the preservation of the estate." *Trust Co. v. Rasberry,* 226 N.C. 586, 39 S.E. 2d 601, and cases cited.

Furthermore, Indenture A is to the plaintiff, its successors and assigns, in fee simple, upon the trusts and conditions therein set forth, to be forfeited only upon a breach of the stipulated conditions. The trust is to be executed by the grantee, its successors or assigns. Thus, it is apparent the grantor contemplated the possible appointment of a substitute trustee by conveyance. In any event, the grantee is, under the terms of the conveyance, vested with that authority.

In the final analysis the proposed conveyance, referred to as Indenture D, constitutes an appointment of a substitute trustee for administrative purposes and a conveyance of the property to the substitute trustee to that end. The property is to be held by the United States Government under the conditions set forth in the original trust agreement and is to effectuate the trust. If it fails so to do, the property reverts as originally provided. The dedication of the scenic highway right of way and the minor modifications of the conditions in Indenture A are essential for the preservation of the trust.

The interest of those who may eventually take under the reverter clause is remote and of infinitesimal value. Such rights as they may have are preserved in the proposed conveyance. Hence, whether the limitation over to the heirs of Moses H. Cone upon forfeiture of the estate by the trustee is violative of the rule against perpetuities is wholly immaterial here. Therefore, it must not be understood that we either approve or disapprove that conclusion of the court below. We will cross that bridge when and if we ever come to it.

The grantee in the proposed conveyance takes a fee subject to be defeated only upon breach of the conditions therein set out. It is so stipulated in the instrument and the stipulation is valid and binding.

The Attorney-General, as the representative of the public at large, was made party defendant and filed his answer. In his brief here he assures this Court that in his opinion "the determination made by the Court is in the public interest and will best preserve for future generations the public charity in a manner that will best serve the whole people of the State and effectuate the principal intent of the donor." In that conclusion we concur. Therefore, the judgment entered is

Affirmed.

CITY OF WILMINGTON, NORTH CAROLINA, NEW HANOVER COUNTY, AND C. R. MORSE, CITY-COUNTY TAX COLLECTOR, v. LIZZIE WRIGHT MERRICK, LILLY WRIGHT, ONLY CHILDREN AND HEIRS AT LAW OF TITUS WRIGHT, DECEASED, AND THEIR HUSBANDS, EDWARD WRIGHT AND WIFE, ... WRIGHT, AND ANY AND ALL HEIRS AND/OR DEVISEES, AND ANY AND ALL PERSONS, FIRMS OR CORPORATIONS WHO MIGHT IN ANY CONTINGENCY CLAIM AN INTEREST IN THE PROPERTY INVOLVED IN THIS ACTION, KNOWN OR UNKNOWN, SUI JURIS OR NON SUI JURIS, INCLUDING ANY NOT IN ESSE WHO MIGHT BY POSSIBILITY HEREAFTER SET UP A CLAIM.

(Filed 14 December, 1949.)

1. Taxation § 40c—

In an action to foreclose a tax lien under G.S. 105-414, persons having an interest in the equity of redemption must be made parties by name, G.S. 105-391 (e) not being applicable, and judgment rendered in such proceeding is void as to persons having such interest who are not made parties.

2. Taxation § 40b—

The provision of G.S. 105-391 (e) permitting persons who have disappeared, who cannot be located, or whose names and whereabouts are unknown, to be served by publication under a fictitious name or by designation as heirs and assigns, is protective in nature and may not be used as a subterfuge to excuse failure to serve process on those whose names can be discovered by the exercise of due diligence.

3. Taxation § 42—

The contention that judgment foreclosing a tax lien should not be vacated on motion of persons owning the equity of redemption who had not been made parties and served with process, because it would cast doubt upon other tax titles, is untenable, since it will not be assumed that other proceedings were irregular, but even so, a landowner may not be deprived of his property without due process of law.

4. Appearance § 2b: Judgments § 27b—

A general appearance made for the purpose of moving to vacate a judgment on the ground that movants were not made parties and served with process, and that therefore the judgment was void as to them, cannot have the effect of validating the judgment or waiving the defect.

APPEAL by plaintiffs from *Harris, J.*, April Term, 1949, NEW HANOVER. Affirmed.

Civil action under G.S. 105-414 to foreclose tax liens on real property, heard on motion by certain cotenants to vacate the judgment entered and the writ of possession issued after judgment.

Titus Wright died prior to 1891, seized and possessed of a certain lot in the City of Wilmington. He left surviving two daughters, Lizzie Wright Merrick and Lilly Wright. The movants, Luberta Merrick Williams and Isabella Merrick Womack, are daughters of Lizzie Wright Merrick, deceased. Lilly Wright also died prior to the institution of this

action, leaving a son, Willie Wright, surviving. The relationship of Ida Wright and Edward Wright is not disclosed by the record. The said Luberta Merrick Williams, Isabella Merrick Womack, Willie Wright, and other children of the two deceased daughters were, at the time of the institution of this action, the owners of said lot as tenants in common. The complaint alleges that the property "was duly listed and returned for taxation at the time, or times, hereinafter set forth . . .," but the person or persons in whose name or names the property was listed is not disclosed. Taxes assessed by plaintiffs against the premises for a number of years prior to 1946 being unpaid, this action was instituted, captioned as above, to foreclose the lien thereof.

J. H. Ferguson, having been appointed guardian *ad litem* of "any infants, incompetent insane or of unsound mind . . . and all parties who may be in the Armed Forces of the United States . . . who have or may have, an interest in the property involved in this action," filed answer admitting all the allegations in the complaint. No other answer was filed. The land was sold and judgment of confirmation was entered.

The purchaser, R. L. Lewis, petitioned the court for a writ of possession. Notice of the motion was served on Ida Wright, Isabella Merrick Womack, and Luberta Merrick Williams, the parties in actual possession of at least a part of the premises. On the return day of the notice, no answer having been filed, a writ of possession was issued.

Thereafter, Isabella Merrick Womack and Luberta Merrick Williams appeared and moved the court to vacate the judgment of foreclosure and the deed executed thereunder and to recall the writ of possession for the reason that they were never made parties to this action and no process has ever issued against them; that no cause of action is stated in the complaint as against them; that two of the three named defendants were not living at the time of the institution of this action; that part of the land sold is listed in the name of James McMillan who is not a party defendant; and for other causes stated.

Copies of the original summons and complaint were delivered to the movants. One-half of the property sold is listed in the name of James McMillan. This is admitted by plaintiffs.

When the motion came on to be heard, the court found as a fact that the movants were never made parties to this action and that no process was ever served on them, making them parties, and adjudged that the foreclosure judgment and the deed executed by authority thereof are null and void as to the movants and recalling the writ of possession as to them. Plaintiffs excepted and appealed.

G. C. McIntire for plaintiff appellants and J. H. Ferguson for R. L. Lewis, purchaser at foreclosure sale.

Hogue & Hogue for defendant appellees.

BARNHILL, J. The many alleged defects in the proceeding appearing on the face of this record invite much writing which in the end would serve no useful purpose. In the final analysis the appeal presents two questions: (1) Were the movants made parties defendant herein so that they are bound by the judgment entered, and, if not, (2) Did they, by their general appearance and motion to vacate the judgment, waive the defect? We are constrained to answer each question in the negative?

It must be noted in the beginning that this is an action instituted under the provisions of C.S. 7990, now G.S. 105-414. It is so alleged in the complaint. This is understandable. Had plaintiffs pursued the alternative method provided by G.S. 105-391, the collection of a large proportion of the amounts claimed might be barred.

The action is in the nature of an action to foreclose a mortgage. G.S. 105-414; *Comrs. of Washington v. Gaines,* 221 N.C. 324, 20 S.E. 2d 377. Its very purpose is to foreclose the interest of the owners, sell all the right and title of the taxpayer, and enable the purchaser at the sale to ascertain what title it is that he buys. The owners of the property, subject to the asserted lien, must be made parties to the action. *Jones v. Williams,* 155 N.C. 179, 71 S.E. 222; 37 A.J. 44. The decisions in this State are uniform in holding that all persons having an interest in the equity of redemption should be parties to a proceeding for foreclosure. *Riddick v. Davis,* 220 N.C. 120, 16 S.E. 2d 662, and cases cited; *Comrs. of Washington v. Gaines, supra.* "A decree of foreclosure is a nullity as to the owner of the equity of redemption not made a party to the action;" and it "does not conclude an interested person who is not made a party to the proceeding." 37 A.J. 46.

Under no view of the record before us may it be said that the movants were made parties to this action. Only three persons are made parties defendant by name. Two of these were then dead and the interest of the other is not disclosed. As to these three, there was service of summons by publication.

The mere service of process upon a person does not serve to make him a party to the action. Something more is required. He must either be named as a party in the beginning or must be brought in by order of the court.

So then, the question is narrowed to this: Is the designation "any and all heirs and/or devisees" sufficient to include the movants as parties defendant and put them on notice that they were required to answer or be forever barred by the judgment entered?

In 1939 the Legislature, by Chap. 310, P.L. 1939, now G.S. 105-391 *et seq.,* created alternative methods of foreclosure of tax liens. This Act provides that "the listing taxpayer and spouse, if any, the current owner . . . and all persons who would be entitled to be made parties to a court

action . . . to foreclose a mortgage on such property, shall be made parties and served with summons in the manner provided by sec. 1-89."

Only subsections (f) to (v) inclusive of sec. 1719 thereof, now G.S. 105-391, were made applicable to foreclosures under G.S. 105-414. Hence, G.S. 105-391 (e) is not available to plaintiffs in this proceeding. This section contains the "heirs and assignees" appellation provision upon which plaintiffs rely. It, however, relates only to "persons who have disappeared or cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons . . ." These "may be served by publication; and such persons, their heirs and assignees may be designated by general description or by fictitious names in such actions." Thus it applies only to persons (1) who have disappeared, (2) who cannot be located, (3) whose names and whereabouts are unknown, and (4) their heirs and assignees. It was designed to provide a method of service on those who are not available for personal service and to bring in those who have succeeded to their rights in the event they are dead.

It may be said that Lizzie Wright Merrick, deceased mother of the movants, had departed for parts unknown, but it could hardly be contended that service by publication would reach far enough to bring her in. Her heirs were present and available for service. They lived on the premises. The sheriff's return put plaintiffs on notice that they could be found and that they were interested parties. And they were, during the pendency of the action, making installment payments upon the taxes due.

The section, even if applicable here, is protective in nature. It must not be used as a subterfuge to excuse actual notice when such notice was so apparently within the power of plaintiffs. Neglect to ascertain their whereabouts, when slight diligence would have disclosed their presence in the county as occupants of the premises, will not excuse the failure of plaintiffs to make them parties to the action. Furthermore, plaintiffs did discover that movants had an interest in the property. They inserted their names in the caption to the judgment of foreclosure. Yet they took no action to bring them in as parties. They cannot now complain that they, the movants, assail the validity of the judgment herein.

It is suggested that if this judgment is vacated for the causes assigned, it will create doubt respecting other foreclosure proceedings and cast a cloud on the titles conveyed thereunder. But we may not assume that other taxing units have undertaken to sell the land of taxpayers under foreclosure without first making reasonably diligent effort to ascertain who the owners are and make them parties to the proceedings, or that they have failed to comply with the other simple rules governing the foreclosure of tax liens. Even if such should be the case, it affords no

sufficient reason for depriving a landowner of his property without due process of law.

The movants, in filing their motion, made a general appearance. But a general appearance to move to vacate a void judgment does not validate the judgment. If the movants were not parties to the action their appearance and motion to have the judgment herein stricken from the record did not serve to ratify the prior proceedings in the cause. *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311.

The judgment below is

Affirmed.

STATE v. CHARLES GONZAGA STREETON.

(Filed 14 December, 1949.)

1. Homicide § 4d—

A murder committed in the perpetration or attempted commission of the felony of kidnapping or holding a human being for ransom, G.S. 14-39, constitutes murder in the first degree, G.S. 14-17, and an instruction to this effect upon supporting evidence cannot be held for error.

2. Homicide § 1b—

G.S. 14-17 does not change the common law definition of murder but merely divides murder as defined by the common law into two degrees.

APPEAL by the prisoner from *Patton, Special Judge,* and a jury, at the July Term, 1949, of GUILFORD.

The prisoner was indicted for the murder of Carl Davis. The testimony for the State disclosed the matters set forth below.

The deceased, Carl Davis, was the crippled son of McKinley Davis, a coal and ice dealer in High Point. He and the prisoner, Charles Gonzaga Streeton, had married sisters. In March, 1949, however, Carl Davis and his wife were separated. He was then residing in the household of his parents in High Point.

At 7 o'clock p.m. on Monday, 14 March, 1949, Streeton borrowed a 38-caliber pistol and five cartridges of like diameter from the State's witness, Lloyd Portee, for the avowed purpose of protecting himself during a proposed trip to the Virginia mountains. On the following day, *i.e.,* at 5:00 o'clock p.m. on Tuesday, 15 March, 1949, Streeton returned the pistol and four 38-caliber cartridges to Portee. The evidence does not reveal whether the pistol had been freshly fired or cleaned when Streeton delivered it to Portee.

Meanwhile, the events depicted in the next four paragraphs transpired.

Witnesses for the State saw a gray Mercury Sedan owned by Carl Davis and a green Studebaker car belonging to Streeton standing beside the College Grill, a cafe near the eastern edge of High Point, from 8:00 p.m. until 9:30 p.m. on Monday, 14 March, 1949. Carl Davis and Streeton spent this time in the Mercury automobile, talking, eating and drinking beer together. This was the last time that Carl Davis was seen alive by any of the witnesses. The evidence does not indicate directly how or when the prisoner, or the deceased, or the motor cars left this spot.

At 10:30 p.m. on the same night, a taxi driver named Roy Hunt picked up a fare in the neighborhood in which the Mercury car was afterwards found, and transported him to a place near the College Grill, where he alighted and proceeded on foot towards the College Grill. Hunt did not identify his passenger as the prisoner, but he described his size and clothing. The description tallied with that of Streeton as given by other witnesses who saw him earlier in the evening.

Shortly after midnight, John H. McAdoo, Jr., a policeman of Greensboro, saw Streeton near the telephone booths in the Union Bus Terminal at Greensboro, and noted that Streeton was observing him "very carefully." About this time, to wit, at 12:20 a.m. on Tuesday, 15 March, 1949, Mrs. Rosa Tillman, a telephone operator on duty in Greensboro, took a long distance call, which originated in a booth at the Union Bus Station in Greensboro, for the phone in the residence of the parents of the deceased in High Point. According to McKinley Davis, his telephone rang "around 12:30 or 12:35" a.m. on Tuesday, 15 March, 1949, and it was answered by his wife, who had an undisclosed conversation with some person not identified.

In consequence of this conversation, Mr. and Mrs. McKinley Davis went forthwith to the police station in High Point, where they reported the disappearance of Carl Davis and the phone conversation to the police, who cautioned them to keep these matters secret until the mystery surrounding the vanishing of their son should be solved. Pursuant to this admonition, Mr. and Mrs. McKinley Davis withheld these matters from the press and public. Immediately after their visit to the police station, the empty Mercury Sedan of the deceased was discovered by policemen in a vacant lot "in the 1500 block of North Main Street" in High Point.

At 8:45 p.m. on Tuesday, 16 March, 1949, the telephone in the Davis home rang again. It was answered by McKinley Davis, who had an undisclosed colloquy with some man whose voice he could not identify. He had "never talked to Charles Streeton on the phone." McKinley Davis immediately reported the phone conversation to his son-in-law, Wilber J. Alexander, who was present and who forthwith dashed onto the front lawn, where he found a handkerchief "with a rock and a note tied up in it." The note was as follows: "No marked money. Have you

got money. 5000. If so put in bag. Leave at 9:30 P. M. at Hieway Cafe mail box or he wont be safe. If got money he will be home in 10 hrs OK. If you get me, they get Carl. Hieway Cafe at Maryfield Hospital Jamestown." The note was penciled in printed capitals.

Assisted by police officers, McKinley Davis proceeded without delay to a point on the High Point-Jamestown Highway near the Maryfield Convalescent Home, where he put a paper-filled money bag in a mail box lettered "Highway Cafe." This box was shadowed by heavy shrubbery, stood in front of what was then a vacant house, and was located "about five or six city blocks" from the place where the prisoner resided.

At 11:15 p.m. on the same night, Streeton drove to the "Highway Cafe" mail box in his Studebaker car, alighted, and opened the mail box with his right hand, which was infolded in a white cloth. He was thereupon arrested by police officers, who had been hiding nearby and who conveyed him to the police station in High Point.

According to W. T. Highfill, a policeman, this colloquy took place between him and Streeton as soon as they reached the police station: "I said: 'You know what we have you here for, and we want to know where that boy is.' He said: 'I don't know where Carl is.' At the time Charles Streeton said that, Carl Davis' name had not been mentioned. Nothing had appeared in the newspapers at that time that Carl Davis was missing."

At 8:00 p.m. on Wednesday, 16 March, 1949, Streeton made a statement "with reference to the location of the body of the deceased, Carl Davis." In consequence thereof, the corpse of Carl Davis was found under a bridge which spanned a small watercourse in an isolated spot on the campus of High Point College. An autopsy revealed that death had resulted from a 38-caliber bullet, which entered the back of the deceased and left powder burns on both the clothing and the flesh at the point of entrance. The physicians, who performed the autopsy, expressed no opinions as to the time of occurrence of death, and no effort was made to show that the bullet, which was recovered, had been fired from the pistol which Portee had loaned Streeton.

On Friday, 18 March, 1949, Streeton's wife visited the jail and asked him this question in the presence of certain of the State's witnesses: "Why did you kill Carl?" He replied: "You know how bad we needed money." Sometime later on the same occasion Streeton told his wife in the presence of the same witnesses that "he killed Carl because Carl had made a slighting remark" about her.

The only evidence offered in behalf of the prisoner was medical testimony indicating that he had been afflicted by mental instability for some years.

The trial judge instructed the jury that it could return any one of five different verdicts, to wit: (1) Guilty of murder in the first degree; (2) guilty of murder in the first degree with recommendation that the punishment be imprisonment for life in the State's prison; (3) guilty of murder in the second degree; (4) guilty of manslaughter; and (5) not guilty.

The jury found the prisoner guilty of murder in the first degree and recommended that his punishment be imprisonment for life in the State's prison in conformity to G.S. 14-17 as rewritten by chapter 299 of the 1949 Session Laws, and the court entered judgment accordingly. The prisoner excepted and appealed, assigning as error the receipt of certain testimony and specified excerpts from the charge.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

C. A. York, Sr., and C. A. York, Jr., for the prisoner, appellant.

ERVIN, J. The prisoner reserved exceptions to various parts of the charge in which the trial judge instructed the petit jury in specific detail that it would return a verdict of guilty of murder in the first degree in the event it found beyond a reasonable doubt from the testimony that the prisoner undertook by force or violence to kidnap the deceased or to hold him for ransom and thereby unintentionally caused his death. It is manifest that the facts and circumstances adduced by the State at the trial were sufficient to warrant a finding that the deceased met death in the manner indicated in these instructions. Hence, the exceptions now under review raise the question as to whether these portions of the charge embody a principle recognized as valid by the law of homicide.

It is to be noted that G.S. 14-39 makes it a felony for any person "to kidnap . . . any human being . . . or to hold any human being for ransom."

Murder is not divided into degrees at common law, any unlawful killing of a human being with malice aforethought, either express or implied, being murder. *S. v. Trott,* 190 N.C. 674, 130 S.E. 627; 42 A.L.R. 1114; *S. v. Dalton,* 178 N.C. 779, 101 S.E. 548; *S. v. Banks,* 143 N.C. 652, 57 S.E. 174; *S. v. Cole,* 132 N.C. 1069, 44 S.E. 391; *S. v. Bishop,* 131 N.C. 733, 42 S.E. 836; *S. v. Johnson,* 23 N.C. 354, 35 Am. D. 742; *S. v. Negro Will,* 18 N.C. 121; *S. v. Reed,* 9 N.C. 454; *S. v. Boon,* 1 N.C. 191.

Malice aforethought is implied at common law in homicides where the slayer kills another while engaged in committing or attempting to commit a felony, and consequently such a killing constitutes murder, whether the death be intended or not. 26 Am. Jur., Homicide, section 195; 40 C.J.S., Homicide, section 21; Warren: Homicide (Perm. Ed.), section 74. The rule applies to felonies created by statute as well as to common law

felonies. Brill: Cyclopedia of Criminal Law, section 633; Burdick: The Law of Crime, section 454. It has been suggested, however, that the rule should be confined to homicides committed in the perpetration of felonious acts having a natural tendency to cause death. *Regina v. Serne,* 16 Cox C. C. 311; *People v. Goldvarg,* 346 Ill. 398, 178 N.E. 892; *Powers v. Commonwealth,* 110 Ky. 386, 61 S.W. 735; 63 S.W. 976, 53 L.R.A. 245; *People v. Pavlic,* 227 Mich. 562, 199 N.W. 373; Holmes: The Common Law, 57-59; Burdick: The Law of Crime, section 454. Such limitation may be implicit in the undoubted requirement that the homicide must be a natural and reasonable consequence of the felony being perpetrated. 40 C.J.S., Homicide, section 21; Burdick: The Law of Crime, section 454.

The General Assembly of 1893 adopted the statute now embodied in G.S. 14-17, dividing murder into two degrees. This statute does not give any new definition of murder, but permits that to remain as it was at common law. The enactment simply selects out of all murders denounced by the common law those deemed more heinous on account of the mode of their perpetration; classifies them as murder in the first degree; and provides a greater punishment for them than that prescribed for "all other kinds of murder," which it denominates murder in the second degree. *S. v. Smith,* 221 N.C. 278, 20 S.E. 2d 313; *S. v. Dalton, supra.*

The Legislature regarded the felony-murder sufficiently atrocious to be included in the category of first degree murder. For this reason, the statute now codified as G.S. 14-17 contains this provision: "A murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony shall be deemed to be murder in the first degree."

It is evident that under this statute a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not.

There are now many statutory felonies which have no natural tendency to cause death and by reason thereof are much less serious crimes than the common law felonies giving rise to the felony-murder rule. We express no opinion, however, as to whether the words "other felony" as used in the statute mean any statutory felony, or are limited under the *ejusdem generis* principle to felonies dangerous to life. No such question is raised by the present record.

The statutory provision declaring a felony-murder to be murder in the first degree has been applied many times to homicides resulting from the commission or attempted commission of arson (*S. v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1); burglary (*S. v. Bell,* 205 N.C. 225, 171 S.E. 50); rape (*S. v. King,* 226 N.C. 241, 37 S.E. 2d 684; *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494); and robbery (*S. v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352;

S. v. Miller, 219 N.C. 514, 14 S.E. 2d 522; *S. v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533; *S. v. Williams,* 216 N.C. 446, 5 S.E. 2d 314; *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11; *S. v. Exum,* 213 N.C. 16, 195 S.E. 7; *S. v. Linney,* 212 N.C. 739, 194 S.E. 470; *S. v. Glover,* 208 N.C. 68, 179 S.E. 6; *S. v. Green,* 207 N.C. 369, 177 S.E. 120; *S. v. Stefanoff,* 206 N.C. 443, 174 S.E. 411; *S. v. Langley,* 204 N.C. 687, 169 S.E. 705; *S. v. Donnell,* 202 N.C. 782, 164 S.E. 352; *S. v. Myers,* 202 N.C. 351, 162 S.E. 764; *S. v. Sterling,* 200 N.C. 18, 156 S.E. 96; *S. v. Westmoreland,* 181 N.C. 590, 107 S.E. 438; *S. v. Lane,* 166 N.C. 333, 81 S.E. 620.)

The occasion for invoking the felony-murder rule ordinarily arises in homicides resulting from the perpetration or attempted perpetration of the four felonies specifically named in the statute, *i.e.,* arson, burglary, rape and robbery. This is necessarily true because these four offenses are so highly perilous to life. But this Court has declared that under the statute "murder committed in the perpetration of a felony is now murder in the first degree," and has sanctioned the application of this doctrine to a homicide resulting from an attempt to perpetrate an unspecified felony, *i.e.,* a larceny, under circumstances dangerous to life. *S. v. Covington,* 117 N.C. 834, 23 S.E. 337.

When a person undertakes by force or violence to kidnap another or to hold him for ransom contrary to G.S. 14-39, he commits or attempts to commit a felony which has a natural tendency to cause death.

It follows, therefore, that the instructions now under review properly state a settled principle prevailing in the law of homicide.

We have considered the other assignments of error with extreme care, and have reached the deliberate conclusion that none of them can be sustained. We omit further discussion, however, for the reason that the remaining exceptions merely relate to the application of established legal rules to the case at bar.

The prisoner was unable to retain counsel on account of his poverty, and the attorneys who defended him were assigned that important task by the court. We deem it not amiss to observe in closing that they have performed their duty in the premises in accord with the highest tradition of their profession.

The trial and the judgment will be upheld for there is in law

No error.

STATE v. HECTOR CHAVIS AND LEANDER JACOBS.

(Filed 14 December, 1949.)

1. Homicide § 3—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17.

2. Homicide § 5—

The intentional killing of a human being with a deadly weapon implies malice, and if nothing else appears, constitutes murder in the second degree.

3. Homicide § 16—

Where the unlawful killing of a human being with a deadly weapon is established, the burden is upon the State to show premeditation and deliberation beyond a reasonable doubt in order to constitute the offense murder in the first degree.

4. Homicide § 4c—

Premeditation is thought beforehand for some length of time, however short; and deliberation means an act is done in a cool state of blood and not under the influence of a violent passion aroused suddenly by some lawful or just cause or legal provocation.

5. Homicide § 21—

In determining the question of premeditation and deliberation, the conduct of defendants, before and after, as well as at the time of, the homicide, and all attendant circumstances, are competent.

6. Homicide § 4d—

A murder committed in the perpetration or attempt to perpetrate a robbery or any felony is murder in the first degree, G.S. 14-17, and in such instance the State is not put to proof of premeditation and deliberation.

7. Homicide § 2—

Where there is a conspiracy between defendants to rob the deceased and the killing is perpetrated in the execution of such conspiracy, each conspirator is guilty of murder in the first degree.

8. Homicide § 25—

Evidence tending to show that defendants conspired to rob deceased and that they killed him with deadly weapons in the perpetration of the robbery, is sufficient to take the issue of their guilt of murder in the first degree to the jury.

9. Criminal Law § 38d—

Where there is testimony that certain photographs accurately depicted the position of the body of deceased as it was found after the homicide, such photographs are competent for the restricted purpose of illustrating the testimony of the witnesses in regard thereto.

10. Homicide § 30—

Where testimony of statements of defendants is to the effect that defendants beat deceased over the head with a pistol and shotgun, causing him to fall to the floor, and it appears that deceased was later found with his skull crushed where he had fallen, the admission of expert testimony that deceased died from skull fracture "caused by the blows from the pistol and shotgun" cannot be held prejudicial.

APPEAL by defendants from *Burney, J.*, at April Term, 1949, of ROBESON.

Criminal prosecution upon a bill of indictment containing two counts charging that on 5 April, 1949, Hector Chavis and Leander Jacobs, and another, one Worth Lee Chavis, (1) did commit the crime of burglary in the first degree in respect to the sleeping quarters of one Martin L. Blackwell in Robeson County, North Carolina, and (2) the crime of murder in the first degree of one Martin L. Blackwell.

The defendants, upon arraignment duly had, pleaded "Not guilty," and upon motion of counsel for Worth Lee Chavis the court allowed a severance, and proceeded with the trial only of the case against defendants Hector Chavis and Leander Jacobs.

Upon the trial in Superior Court the State offered evidence tending to show substantially this narrative of facts: On 5 April, 1949, Martin L. Blackwell, 79 years of age, resided in a building located on Highways 74 and 301, about 500 yards west of the corporate limits of the town of Lumberton, in Robeson County, North Carolina. The building consisted of two rooms. In the front room he operated a store with two counters, one on each side, with space between. He slept in the rear room. There was a front door, and a door connecting the two rooms, and another on the rear.

On the early morning of 6 April, 1949, the dead body of Martin L. Blackwell was found on the floor of the store in a pool of blood, near the front door and about equidistant from the counters, with head toward and about 4 feet from the front door, and the feet toward the rear. The head of the body was battered, bruised and cut, and the skull was dented, crushed and split in several places. And the body was clad only in "long-handle" underwear. The front door was locked. The back door was open, with the key in the lock on the inside, along with several other keys. The bed was disarranged. There was no blood in the bedroom, but leaving the sleeping quarters coming toward the front on the left, blood was spattered on the candy case, about four feet from the body, and where the body was lying blood was spattered on the left counter up to about three feet from the floor. About 18 inches beyond the head there was a hole, freshly made, in the floor. In this hole there was the wadding of a 12-gauge shotgun. There were El Reeso cigars on the floor behind

the right counter as the store is entered from the front and some Peter Paul Mound's candy on this counter.

Two distinct sets of tracks led to the back fence—20 steps from the back door. There was an opening in the fence. Just beyond it there was a ditch about four feet wide, with about eight inches of water in it. In this water a pistol, a 38 Smith & Wesson short, and a bar of Peter Paul Mound candy were found. Just across the ditch there was a box of candy and an El Reeso cigar.

The tracks were followed by officers back toward Lumberton to a dance hall, 250 yards from the Blackwell store. Across the street in front of the dance hall there was a little path leading through the woods. Along this path coins amounting to 85 cents were found,—a 25c coin at the end of it. There a double-barrel shotgun, minus the stock, a box of Mound candy, two $1.00 bills, a jar of white liquor, a half-pint empty bottle, three empty cigar boxes, two empty candy boxes and some eight or ten El Reeso cigars were found. On the breach part of the gun and around the safety and under the trigger guard there was blood and what looked like bits of flesh. The stock of the gun was found about 100 yards away.

The State further offered testimony of witnesses tending to show that the defendants were together in the afternoon and evening of 5 April; that defendant Leander Jacobs wanted to buy an automobile that was offered to him for $25.00; that he was unsuccessful in obtaining the money; that thereafter the defendants made statements to Worth Lee Chavis that they knew where they could get some money; that while they were riding around in the automobile of Worth Lee Chavis they wanted to know if he would be with them; that he declined; that they had him let them out at a point about 100 yards from the Blackwell Store about a quarter to 9 o'clock; that about 10 o'clock that night the defendants appeared at a taxi stand in Lumberton and hired a taxi to take them to Pembroke,—paying therefor four $1.00 bills; that at that time defendant Leander Jacobs was wet practically all over; that on this trip defendant Hector Chavis was in a hurry to get to Pembroke; that at Pembroke and after 10 o'clock on same night defendants hired another taxi, paying therefor $3.00, to take them to Maxton; that then they both were observed to be wet from about waist on down; that arriving at Maxton they were seen to go straight to another taxi; that they hired another taxi, one paying $7.00 and the other $6.00, to take them;—Leander Jacobs to his sisters at Midway, about 8 miles from Maxton, and defendant Hector Chavis rode around with the taxi driver until near daybreak.

The State further offered testimony tending to show that defendant Hector Chavis said in the presence of Leander Jacobs, that after they left Worth Lee Chavis they went to the back of Mr. Blackwell's store; that Hector knocked on the door and Blackwell came to the door with his

gun in his hand and let them in; that before he let them in, he, Hector, told Mr. Blackwell his name; that Mr. Blackwell met them with his gun; that Leander Jacobs took the gun away from him, and hit him over the head with it several times; that Mr. Blackwell grabbed the sawed-off shotgun and that he, Hector Chavis, grabbed the shotgun away, and hit him several times with it; that they took the money to where the shotgun and half-gallon jar of whiskey were found and divided it; and that Mr. Blackwell was on the floor the last time they saw him.

And the State further offered evidence as to statements made by Leander Jacobs, in the presence of Hector Chavis, to the effect that Hector came out first; that where they went through the fence Hector fell over the scantling and into the ditch where the gun was found in the water; that Leander said to Hector that "We are both equally guilty, we both did the job together"; that they were talking on Fourth Street, and Hector said he knew where they could get some easy money,—at Mr. Blackwell's store,—they could go out and rob him; and that they got what money they could get around the store,—some in two or three different cigar boxes, and went on down where they left the gun and whiskey and candy and empty boxes, and divided the money.

The State offered other testimony which tended to corroborate and substantiate the statements of the defendants.

And from the testimony offered by the State there is evidence that on the night in question defendants were drinking.

At the close of the State's evidence, the court allowed defendants' motions for judgment as of nonsuit on the charge of burglary in the first degree. But the court overruled defendants' motions, aptly made, for judgment as of nonsuit as to the charge of murder in the first degree. Exceptions 14 and 15.

The defendants offered no evidence.

Verdict: As to defendant Hector Chavis—"Guilty of murder in the first degree"; and as to defendant Leander Jacobs—"Guilty of murder in the first degree."

Judgment: As to defendant Hector Chavis: Death by the administration and inhalation of lethal gas as provided by law; and as to defendant Leander Jacobs: Death by the administration and inhalation of lethal gas as provided by law.

The defendants, Hector Chavis and Leander Jacobs appeal to the Supreme Court, and assign error.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

J. E. Carpenter for the defendants.

WINBORNE, J. This case portrays an atrocious crime, and careful consideration of the assignments of error presented by defendants fails to reveal error for which the judgment from which appeal is taken should be disturbed. However, we advert to and treat specifically the main exceptions.

I. Assignments of error Nos. 10 and 11, covering Exceptions Nos. 14 and 15, relate to the ruling of the trial court in denying defendants' motions, aptly made, for judgment as of nonsuit as to murder in the first degree.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17. *S. v. Hawkins,* 214 N.C. 326, 199 S.E. 284.

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. *S. v. Payne,* 213 N.C. 719, 197 S.E. 573.

"The additional elements of premeditation and deliberation necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner." *S. v. Miller,* 197 N.C. 445, 149 S.E. 590; *S. v. Payne, supra; S. v. Hawkins, supra.*

" 'Premeditation means thought of beforehand' for some length of time, however short." *S. v. Benson,* 183 N.C. 795, 111 S.E. 869; *S. v. Hawkins, supra.* And it has been said that "deliberation means that the act is done in cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, aroused suddenly by some lawful or just cause or legal provocation." *S. v. Benson, supra; S. v. Hawkins, supra,* and cases cited.

And "in determining the question of premeditation and deliberation it is proper for the jury to take into consideration the conduct of the defendant, before and after, as well as at the time of, the homicide, and all attending circumstances," *Stacy, C. J.,* in *S. v. Evans,* 198 N.C. 82, 150 S.E. 678; *S. v. Hawkins, supra,* and cases cited.

Applying these principles, the evidence in the present case is abundantly sufficient to be submitted to the jury on the first degree murder charge.

Moreover, murder committed in the perpetration or attempt to perpetrate a robbery or other felony shall be deemed to be murder in the first degree. G.S. 14-17. See also *S. v. King,* 226 N.C. 241, 37 S.E. 2d 684,

and *S. v. Bennett,* 226 N.C. 82, 36 S.E. 2d 708, and cases cited. Thus, when a homicide is committed in the perpetration of robbery, the State is not put to the proof of premeditation and deliberation. In such event the law presumes premeditation and deliberation. Applying this principle, the evidence in the case in hand is sufficient to justify a finding by the jury, beyond a reasonable doubt, that the killing of the deceased by defendants was done in the perpetration of the crime of robbery.

And there is in this case evidence tending to show a conspiracy between defendants to rob the deceased, and that the killing was perpetrated in the execution of such conspiracy. Where two or more persons conspire to rob another and he is killed by one of the conspirators in the perpetration, or attempted perpetration of the robbery, each, and all of the conspirators would be guilty of murder. *S. v. Bennett, supra,* and cases cited.

Applying these principles to the evidence shown in the case on appeal here under consideration, there is no error in submitting the case to the jury on the charge of murder in the first degree.

Indeed, a reading of the charge given to the jury by the trial judge fully and fairly presented the case—so much so, that defendants find no fault with it—and make no exception to any part of it.

II. Assignments of error Nos. 2 to 8, both inclusive, covering Exceptions 5 to 12, both inclusive, relate to photographs, referred to in the evidence as Exhibits A and B, and manifestly in evidence, pertaining to the location of the body of the deceased when found and seen on the floor of the store on the morning of 6 April, 1949, used in the course of the examination of witnesses for the State as to which in each instance in which objection was made, the court ruled that the photograph is allowed or is offered "for the purpose of allowing the witness to illustrate his testimony and no other purpose," and that "it is not substantive evidence." Moreover, there is testimony that the photographs are true representations of the position of the body as it was found in the store.

While the decisions of this Court uniformly hold that in the trial of cases, civil or criminal, in this State, photographs may not be admitted as substantive evidence, where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating to the jury his testimony relevant and material to some matter in controversy. See *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824, where the principle has been applied recently, and the authorities in support of it are assembled. Hence it is not necessary to reiterate and repeat here what is said there. It is sufficient to say that the principle as there declared appears to have been applied properly here, and the use of the photographs properly restricted to the purpose of illustrating the testimony of the witnesses. Indeed, it does not appear that the testi-

mony sought to be illustrated is irrelevant and immaterial to the issue involved in the trial. Thus, the assignments of error presently under consideration are held to be without merit.

III. Assignment of error No. 9 covering Exception No. 13, is directed to the action of the court in overruling objection by defendant to an hypothetical question, based upon evidence, as to whether the medical expert has an opinion satisfactory to himself as to the cause of the death of deceased. The witness answered "I do." Then without objection the witness was asked, "What is that opinion?", and in answer thereto without objection, said, "He died from skull fracture caused by the blows from the pistol and shotgun." Thus the record fails to present exception to the answer which defendants now seek to contend was erroneously admitted. But, in any event, a reading of the evidence fails to show that defendants were prejudiced by the answer of the witness. Statements of defendants made to officers show that M. L. Blackwell was on his feet when defendants entered his store, that one beat him over the head with a pistol, and the other with a shotgun; that they left him on the floor; that he was later found where they left him; that his head and skull were split open and crushed; and that he was dead. In the light of this evidence, the cause of his death is unmistakable.

All other assignments of error, brought forward, have been given due consideration, and in them error is not made to appear.

Hence, in the judgment below, we find

No error.

STATE v. HOWARD McIVER.

(Filed 14 December, 1949.)

1. Assault § 8c—

In order to constitute the offense of assault on a female it is not necessary that defendant have the present intent and ability to carry out the threat or menace, but it is sufficient if under the circumstances the character of the threat is such as to cause prosecutrix to go where she would not otherwise have gone or leave a place where she had a right to be.

2. Assault § 13—

Evidence tending to show that defendant deliberately planned to meet prosecutrix while she was on her way to work along the street of a city on successive mornings about seven o'clock and before full daylight, that he went out of his way to directly approach her on her side of the path, and repeatedly made an indecent sexual proposal to her, frightening her and, on the occasion in question, causing her to run into the street to avoid him, *is held* sufficient to be submitted to the jury in this prosecution for assault on a female.

STATE *v.* McIVER.

DEFENDANT'S appeal from *Nimocks, J.*, March Term, 1949, CUMBERLAND Superior Court.

The defendant was tried in the Recorder's Court of the City of Fayetteville on a warrant charging him with an assault on a female, and found guilty. He appealed to the Superior Court of Cumberland County, where he was again found guilty by the jury, and, from the sentence imposed, appeals to this Court. The appeal poses the single question whether the evidence is legally sufficient to sustain the verdict, raised by demurrer and motion to nonsuit in the lower court.

Mrs. Helen Outlaw, the alleged subject of the assault, a white woman of good character, worked at a laundry on Russell Street in Fayetteville. She identified McIver, a colored man, as the person she met on that street, near the railroad crossing, on January 7, about 7:00 o'clock in the morning on her way to work. At that time he said to her, "You are looking pretty this morning." On Thursday morning, on her way to work, she met him again. It had been raining, and she was walking a little to the edge of the sidewalk. "There was no street there, and I looked around, back of this water, and he was coming toward me, right around the water and he started talking."

It is not necessary to print the remark, but it may fairly be construed as an indecent sexual proposal. "I was so frightened I got off the street and a car must have been right there because it honked at me and I went on across the street."

She reported these occurrences to the police, and had an assurance that she would receive protection, was told to go on next day as she had usually been doing.

On Friday morning, about the same hour, when she had gotten to about the same place on her way to work—she again met the defendant, and he said to her precisely the same thing as before. Mr. McLaurin, of the police force, who had promised to be there, appeared. Mrs. Outlaw pointed out the man to the policeman, and crumpled into a sitting position on the sidewalk.

She testified that the indecent proposals of the defendant had such an effect on her as to "upset her all over." "I could not work; the supervisor had to send a girl back to help me out. I was certainly frightened that morning. I couldn't even stand up. I just folded up on the ground."

The defendant was placed under arrest.

On cross-examination she testified: "This colored man never placed a hand on me in his life; I don't know whether he would have or not, but he was coming." The occurrence, she stated, was near the Bryan Pontiac place, and the Coca-Cola plant.

She further stated that when he accosted her on Thursday morning he was "coming around the water towards me. There was a pool of water

there. I was on one side and he was on the other; . . . he was coming right around towards me. I got off into the street and he went on . . . I did not look. I did run, I ran into the street. It isn't right to say that I stepped out to go on the other side of the puddle and he went on the other . . . I got on the street and crossed and didn't see him any more. He didn't try to follow that I know of. He didn't try to bother me that I know of . . . As to whether he bothered me that morning, he didn't put his hands on me, but he certainly upset me . . . As to whether he tried to follow me or go after me . . . I think he was there in the block waiting for me . . . It was kind of dark at 6:45 in January on a rainy, dank, foggy morning; it was not very light . . . I saw him in the second block . . . at least half a block. I don't think he made any attempt to do me harm."

For the State, C. D. McLaurin, a policeman of the City of Fayetteville, testified that he saw both Mrs. Outlaw and the defendant that morning on Russell Street. He did not speak to her at that time. After witness first saw her she went on down the street. McLaurin was in a car, and watched Mrs. Outlaw go to work that morning. He circled the block up to Winslow Street. He met the defendant in front of the Coca-Cola plant, coming in his direction. Witness circled the block, turned back up that street, and about five minutes later found the defendant "going west, back in the direction of Winslow Street." Witness came back until he saw Mrs. Outlaw coming down the street, about the middle of the block, and saw this colored man meeting her, and when he was within three or four feet he said something to Mrs. Outlaw which witness was not near enough to understand. Mrs. Outlaw pointed to the defendant and McLaurin arrested him, placing him in the car. Witness then went to Mrs. Outlaw, who was sitting on the edge of the curb, and she identified the man as the man who had molested her.

On cross-examination the witness testified that it was light enough for him to recognize the defendant. "There is no sidewalk there; it is a path where people generally walk . . . used as a sidewalk." The man did not stop walking when meeting Mrs. Outlaw, "he made no movement to touch her; he didn't slow down . . . he was calmly walking along his way . . . I don't think he saw me until I was in two or three feet. Until then he had made no change in his speed . . . it was just before sunrise—about dawn."

Defendant demurred and moved for judgment of nonsuit. The motion was declined and defendant excepted.

Defendant introduced several witnesses who testified as to his good character.

Amongst them was Guy M. Brock, for whom defendant had been working in January when this occurrence is alleged to have taken place,

but was not working at the time of the trial. He testified that a person walking on the third block of Russell Street would not be going to his place of business.

Fay Johnson, for whom the defendant had worked about a month, said that since he had worked there his character and reputation were good.

The defendant testified in his own behalf in substance summarized as follows:

He had never seen the lady until the day he was arrested; that he was not the person who met her near the old stock pens. Explaining his presence on Russell Street the morning of his arrest, he said that he had gone to the bus station, on that street, to get some money to pay on his house. The boy was not there, and he returned down Russell Street to the stockyard loading pen and then thought that while it would make him late to work, it would be better than "not to have no place to live," and went back up Russell Street to get his money, and met the woman and was arrested; that he had not said anything to her; that he was singing, moving his lips, and had been doing so all up the block; did not tell Mr. McLaurin he said "Good morning" to her.

In rebuttal witness McLaurin testified that the defendant told him at the police station 15 or 20 minutes after his arrest that he said "good morning, ma'am" to Mrs. Outlaw. Previously he had denied saying anything to her.

Witness said he had known Mrs. Outlaw for five or six years and that her character was excellent.

At the close of all the evidence counsel for defendant again demurred and renewed his motion for judgment of nonsuit, which was denied. Defendant excepted.

The evidence was submitted to the jury, and defendant was found guilty. Motion to set aside the verdict for errors committed during the trial was declined. Defendant excepted. Defendant objected and excepted to the ensuing sentence, and appealed.

Attorney-General McMullan and Assistant Attorney-General Bruton, Walter F. Brinkley, Member of Staff, for the State.

Nance & Barrington for defendant, appellant.

SEAWELL, J. The defense, contending that the conduct of the defendant as presented in the evidence for the State, could not be construed as an assault according to accepted legal definitions, presents for consideration a definition of assault, arising through threat or menace, which makes it essential that the threat be unqualified and that there must be a present intent and ability to carry it out. It is pointed out that the occurrence for which the defendant was convicted took place on a much

traveled street in the City of Fayetteville, and that there was, therefore, no opportunity to carry out any unlawful design which the defendant may have entertained.

That picture does not fit any too closely the frame of the evidence at the time of the occurrence, to which the attention of the Court is more closely directed. It took place before sunrise in January, about 6:50 o'clock on a gray, misty morning at a time there is little evidence of urban activity. However that may be, perhaps it might be said that the surroundings were not favorable for the commission, at that spot, of a more heinous crime; but nevertheless, as described by the State's witness, the manner of defendant in approaching her on that Thursday morning was sufficient to put her in fear that some personal violence, or at least unwelcome physical contact, might result from the sexual urge which, from the proposition he made, seemed to animate the defendant.

And we observe that North Carolina is rightly listed as one of the jurisdictions in which it is not essential to the definition of assault, or to the completion of that crime, that there should be a present ability to carry out the threat or menace if it is sufficient in manner and character to cause the person menaced to forego some right of conduct he intended to exercise, or to leave a place where he had a right to be. *S. v. Williams,* 186 N.C. 627, 120 S.E. 224, 6 C.J.S., "Assault and Battery," sec. 64, n. 50; *S. v. Daniel,* 136 N.C. 571, 48 S.E. 544.

The facts in the *Williams case, supra,* strikingly parallel those of the instant case. In that case there was never any physical contact between the defendant and the young woman, the victim of the assault, and the defendant did not follow or pursue her at any time; the incidents upon which the conviction rested occurred in places just as public or more public than obtains in the instant case; as here, there was repetition of the obscene proposal; the language used was not more threatening than that used by this defendant; and the Court unanimously sustained the conviction.

We do not attempt to re-array the authorities cited in *S. v. Williams, supra,* or those collected in *S. v. Daniel, supra.* But we are constrained to follow the principles laid down in these cases, especially the *Williams case,* which should be controlling here.

The abstract principles of law with which we deal become more concrete when we consider the apparent motivation for the defendant's conduct. The menace was not that of a blow to be inflicted upon the person, or any similar injury. Its significance goes further back. Dealing with the State's evidence and speaking of the reasonable inferences which the jury might draw from it, we have the defendant making repeated obscene proposals to the same woman, implying a sexual desire which, by some obsession, had become directed especially toward her. There is an infer-

ence of deliberate planning to meet her at the same place on successive mornings, with the obsession still upon him, vocally expressed and apparent in his manner. The witness stated that the defendant went out of his way to directly approach her on her side of the path, and in fear of this menacing movement, coupled with the language which he used, she ran into the street and crossed it to avoid him.

The evidence, factually similar to that in the *Williams case,* cannot but be regarded as stronger in its implications, and it is in law sufficient to support conviction.

We find no error.

No error.

MRS. B. E. COLYAR, JR., ADMINISTRATRIX OF THE ESTATE OF LORAIN BROOKINS, DECEASED, v. ATLANTIC STATES MOTOR LINES, INC.

(Filed 14 December, 1949.)

1. Death § 4—

Right of action for wrongful death is solely statutory and the statutory requirement that the action be instituted within one year from the date of such death is a condition annexed to the right of action and not a limitation. G.S. 28-173.

2. Same—

Plaintiff in an action for wrongful death is not required to allege in the complaint that the action was brought within one year from the date of death, but is required to show compliance with this statutory condition by proof upon the trial. *Wilson v. Chastain,* 230 N.C. 390, modified.

ERVIN, J., dissenting.

APPEAL by plaintiff from *Edmundson, Special Judge,* at May Term, 1949, of RICHMOND.

This is an action for wrongful death.

The date of the death of plaintiff's intestate is alleged in the complaint and the summons shows that the action was instituted less than one year from such date, but the complaint did not allege that the action was brought within one year of the death of plaintiff's intestate.

Upon the call of the case for trial, the plaintiff moved to amend, so as to allege the action was brought within one year from the death of plaintiff's intestate. Motion denied. Exception. Whereupon, the defendant demurred *ore tenus,* on the ground that the complaint did not allege that this was an action for wrongful death and that it was instituted within one year after such death.

The demurrer was sustained on authority of *Wilson v. Chastain,* 230 N.C. 390, 53 S.E. 2d 290.

The plaintiff excepted to the ruling and appeals, assigning error.

A. A. Reaves for plaintiff.

J. Laurence Jones and Fred W. Bynum, Sr., for defendant.

DENNY, J. The right to maintain an action for damages for wrongful death was created by statute, now codified as G.S. 28-173. No such action existed at common law. And it has been uniformly held that an action for wrongful death must be instituted within one year of such death, otherwise no cause of action exists. *McCoy v. R. R.*, 229 N.C. 57, 47 S.E. 2d 532; *Webb v. Eggleston*, 228 N.C. 574, 46 S.E. 2d 700; *George v. R. R.*, 210 N.C. 58, 185 S.E. 431; *Curlee v. Power Co.*, 205 N.C. 644, 172 S.E. 329; *Tieffenbrun v. Flannery*, 198 N.C. 397, 151 S.E. 857, 68 A.L.R. 210; *Davis v. R. R.*, 200 N.C. 345, 157 S.E. 11; *Best v. Town of Kinston*, 106 N.C. 205, 10 S.E. 997; *Taylor v. Iron Co.*, 94 N.C. 525.

The statutory requirement that an action for wrongful death must be instituted within one year from the date of such death, is a condition annexed to the right to maintain the action, and not an element of the cause of action. As this is a condition annexed to the right, and not a limitation, compliance therewith must be shown at the hearing, but need not be pleaded. *Mathis v. Mfg. Co.*, 204 N.C. 434, 168 S.E. 515; *Tieffenbrun v. Flannery, supra; Neely v. Minus*, 196 N.C. 345, 145 S.E. 771; *Hanie v. Penland*, 193 N.C. 800, 138 S.E. 165; *McGuire v. Lumber Co.*, 190 N.C. 806, 131 S.E. 274; *Hatch v. R. R.*, 183 N.C. 617, 112 S.E. 529; *Capps v. R. R.*, 183 N.C. 181, 111 S.E. 533; *Bennett v. R. R.*, 159 N.C. 345, 74 S.E. 883; *Trull v. R. R.*, 151 N.C. 545, 66 S.E. 586; *Gulledge v. R. R.*, 147 N.C. 234, 60 S.E. 1134. The plaintiff complied with the statute when she brought her suit within the prescribed time. *Mathis v. Mfg. Co., supra.* However, she must prove such compliance at the trial by introducing evidence "showing that the action was brought within the statutory period." *Tieffenbrun v. Flannery, supra.* This is ordinarily done by introducing the summons in evidence. And in order to meet the requirement of the statute in this respect, it is not necessary to allege in a complaint for damages for wrongful death that "the action is brought within one year of the intestate's death." Our wrongful death statute was enacted nearly one hundred years ago, and this Court has never held or intimated that such an allegation is necessary except in the recent case of *Wilson v. Chastain, supra,* in which case the question was not presented. It follows, therefore, that the decision in *Wilson v. Chastain* is modified in so far as it appears to be in conflict with this decision.

The ruling of his Honor in sustaining the demurrer interposed by the defendant is

Reversed.

ERVIN, J., dissenting: This dissent is based on the conviction that the law is correctly stated in *Wilson v. Chastain,* 230 N.C. 390, 53 S.E. 2d 290.

Since it must furnish the myriad rules necessary to regulate the affairs of men in the manifold relations of life, the law inevitably tends to become a labyrinth in which the unwary is likely to miss his way. For this reason, courts should cherish consistency and simplicity in law whenever that is possible. It is certainly highly desirable that they refrain from engrafting useless exceptions on general principles.

Till now this twofold rule of procedure has been uniformly observed in civil actions: (1) What the pleader must allege, he must prove; and (2) what the pleader must prove, he must allege. This rule merits commendation and preservation if there be any virtue in consistency and simplicity.

The majority of the Court now strike down this rule in actions for wrongful death. They adjudicate that the plaintiff in such a case need not allege what he is required to prove, *i.e.,* that his action was brought within one year after the death of the decedent. G.S. 28-173.

The majority opinion advances no reason in support of this anomalous ruling. In my judgment, the cases cited in it do not sustain the decision of the majority. Indeed, they imply that the converse is the law. They hold this and nothing more: That the statutory requirement that an action for wrongful death must be brought within one year after the death is a condition annexed to the plaintiff's cause of action, and not a statute of limitation, which the defendant must plead; and that in consequence the plaintiff cannot successfully maintain such an action unless he proves at the trial that it was commenced within the time prescribed by the statute. See *McGuire v. Lumber Co.,* 190 N.C. 806, 131 S.E. 274.

Consistency and simplicity ought not to be worthless in the legal market place. To be sure, a philosopher has declared with confidence that "a foolish consistency is the hobgoblin of little minds." Perhaps, I now contend for such a consistency. Be that as it may, some little minds draft pleadings in civil cases, and their task is at best sufficiently abstruse. It ought not to be further complicated by the promulgation of conflicting rules in procedural matters. Moreover, the law might well devise a more practical occupation for those who possess big minds than that of remembering needless exceptions to salutary general principles.

I see no insuperable objection to permitting a plaintiff in a wrongful death action to amend his complaint so as to allege what he is required to prove, *i.e.,* that his action was brought within one year after the death. By so doing, we could preserve intact a consistent and simple rule of procedure, and at the same time permit a decision of the action on the merits.

MARGARET NANCE REECE v. DAVIS J. REECE.

(Filed 14 December, 1949.)

1. Abatement and Revival § 6—

The pendency of a prior action between the parties is not jurisdictional but is only ground for abatement, and if the objection is not properly raised, the court in the second action has jurisdiction to proceed to judgment.

2. Same—

The pendency of a prior action between the parties may be taken advantage of by demurrer if the pendency of the prior action appear on the face of the complaint, and by answer if it does not so appear.

3. Same: Pleadings § 17c—

A motion to dismiss on the ground of the pendency of a prior action between the parties cannot be treated as a demurrer when this fact does not appear upon the face of the complaint, since in such instance a demurrer would be bad as a speaking demurrer. G.S. 1-127 (3).

4. Abatement and Revival § 6—

Where plaintiff admits the pendency of a prior action between the parties, the court may take notice thereof *ex mero motu* even though the matter is not raised by proper procedure.

5. Abatement and Revival § 9: Divorce § 17—

Jurisdiction over the custody of the children born of the marriage rests exclusively in the court before whom the divorce action is pending, G.S. 50-13, and no order for the custody of the children may be entered in a later action by one of the parties for subsistence without divorce.

6. Abatement and Revival § 9—

In order for the pendency of a prior action to be grounds for abating a subsequent action between the parties it must appear that the rights asserted in the second action may be litigated in the first.

7. Same: Divorce § 14—

The right to alimony without divorce is statutory and must be asserted by independent action as provided by the statute, G.S. 50-16, and therefore the prior institution of an action by the husband for absolute divorce does not abate the wife's subsequent action for alimony without divorce, or deprive the court of power to award her alimony and counsel fees *pendente lite* therein, since her claim is not litigable in his suit.

8. Appeal and Error § 10a—

Upon appeal from the denial of a motion relating solely to the pleadings, the record proper constitutes the case to be filed in the Supreme Court, and no service or settlement of case on appeal is required.

APPEAL by plaintiff from *Burney, J.*, in Chambers, 1 October 1949, NEW HANOVER. Reversed.

REECE *v.* REECE.

Civil action for subsistence without divorce in which plaintiff prays the custody of the child born of the marriage.

This action was instituted in New Hanover County 14 September 1949. Plaintiff served notice of a motion for "an Order awarding to the Plaintiff reasonable subsistence and counsel fees *pendente lite* and for the immediate temporary custody of Davis Nance Reece, the Child of the marriage . . ." Grady, J., set the motion for hearing before Burney, J., 24 September 1949. Defendant entered a special appearance and moved to dismiss for that (1) there is another action between the same parties for an absolute divorce and for the custody of the child of the marriage pending in Davidson County, which action was instituted 6 September 1949, and (2) the Superior Court of Davidson County having acquired jurisdiction of the parties and the subject matter of the action prior to the institution of this suit, the Superior Court of New Hanover County is without jurisdiction herein.

The motion and countermotion (having been continued from 24 September) came on for hearing 1 October 1949 before Burney, J., at which time the court, being of opinion that the Superior Court of Davidson County has sole jurisdiction of the matters in controversy in this cause, entered its order dismissing the action. The plaintiff excepted and appealed.

Walton Peter Burkhimer for plaintiff appellant.

Allen & Henderson and Aaron Goldberg for defendant appellee.

BARNHILL, J. The defendant's motion challenges the jurisdiction of the court and is without merit as to plaintiff's primary cause of action. The plea of former action pending is not jurisdictional, though sometimes referred to as such. It is a plea in abatement provided to avoid the splitting of actions and the piecemeal trial of controversies, prevent a multiplicity of suits between the same parties concerning the same subject matter, and eliminate the possibility of conflicting verdicts and judgments based on substantially the same evidence. The court has jurisdiction of the parties and subject of the action. If the plea is not interposed in proper manner, the court may proceed to judgment and the judgment, once entered, is binding upon the parties. *Raleigh v. Hatcher,* 220 N.C. 613, 18 S.E. 2d 207; *Long v. Jarratt,* 94 N.C. 443.

The motion may not be treated as a demurrer to the complaint, for a demurrer is proper only when it appears on the face of the complaint that "(3) There is another action pending between the same parties for the same cause . . ." G.S. 1-127. A speaking demurrer is not permitted. To render the complaint demurrable, that another action is pending must appear on the face of the complaint. Otherwise the plea must be taken

advantage of by answer. *Alexander v. Norwood,* 118 N.C. 381; *Reed v. Mortgage Co.,* 207 N.C. 27, 175 S.E. 834; *Lumber Co. v. Wilson,* 222 N.C. 87, 21 S.E. 2d 893; *Moore v. Moore,* 224 N.C. 552, 31 S.E. 2d 690.

Even so, plaintiff admitted the pendency of the divorce action. The court was thereby advised of the possible conflict of jurisdiction, and might take notice thereof *ex mero motu. Long v. Jarratt, supra; Allen v. Salley,* 179 N.C. 147, 101 S.E. 545. We may, therefore, waive the procedural defects in defendant's position and come to the merits of the controversy.

The court below is without jurisdiction to hear and determine the custody of the child. When a divorce action is pending, jurisdiction over the custody of the children born of the marriage rests exclusively in the court before whom the divorce action is pending. G.S. 50-13; *Winfield v. Winfield,* 228 N.C. 256, 45 S.E. 2d 259; *Robbins v. Robbins,* 229 N.C. 430; *Phipps v. Vannoy,* 229 N.C. 629. The plaintiff here must press her claim to the custody of her child in the divorce action pending in Davidson County or not at all. It is not a controversy determinable in this action.

The rule denies a party the right to maintain an action when there is a prior action pending between the same parties concerning the same subject matter. But "the same subject matter" as here used does not include a separate and distinct cause of action not arising out of the matters and things alleged in the complaint in the first action. It embraces only matters which may properly be pleaded in the first action by way of affirmative defense, counterclaim, or setoff, and it must appear that the rights asserted in the second action may be litigated in the first.

Here, primarily, the plaintiff seeks alimony without divorce under G.S. 50-16. Thus she asserts a right created by statute and must proceed by independent action as therein provided. *Skittletharpe v. Skittletharpe,* 130 N.C. 72; *Dawson v. Dawson,* 211 N.C. 453, 190 S.E. 749. Her claim thereto is not pleadable as a cross action in a suit for divorce instituted by the husband. *Shore v. Shore,* 220 N.C. 802, 18 S.E. 2d 353; *Silver v. Silver,* 220 N.C. 191, 16 S.E. 2d 834; *Ericson v. Ericson,* 226 N.C. 474, 38 S.E. 2d 517.

As her cause of action is not litigable in the divorce action, the latter does not constitute a former action pending within the meaning of the rule. She may pursue her remedy in the court below.

Likewise, she is entitled to seek alimony and counsel fees *pendente lite* to enable her to prosecute her action. It is so stipulated in the statute which creates her cause of action. G.S. 50-16.

The defendant's motion to dismiss the appeal is without merit. No service or settlement of a case on appeal was required. As the cause was heard on the motion and the pleadings, the record proper constitutes the

case to be filed in this Court. *Privette v. Allen,* 227 N.C. 164, 41 S.E. 2d 364; *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22. The judge so ordered at the time appeal was noted.

For the reasons stated the judgment below is

Reversed.

STATE v. SAM STONE.

(Filed 14 December, 1949.)

1. Criminal Law § 54a—

Ordinarily in a criminal action only the general issue of the guilt or innocence of defendant, to be orally answered, should be submitted to the jury, and the submission of several written issues is not usually advisable.

2. Same: Parent and Child § 16: Husband and Wife § 24—

Where, in a prosecution for willfully neglecting to provide adequate support for wife and children, G.S. 14-325, defendant sets up the defense of the adultery of the wife and non-paternity of the youngest child, the submission of written issues by the court as to the paternity of the child, the adultery of the wife, and the guilt or innocence of defendant of offense charged, will not be held for error on defendant's appeal, the jury being instructed that the burden is on the State to prove defendant's guilt beyond a reasonable doubt as to each of the essential elements of the offense.

3. Indictment and Warrant § 15—

The court has discretionary power to permit the striking of certain words from the warrant and the substitution of other words of the same import in lieu thereof in order to make the warrant conform to the language of the statute.

4. Criminal Law § 56—

Where the warrant is sufficient to charge a criminal offense, motion in arrest of judgment for its insufficiency to charge a separate offense contained therein is properly denied.

5. Parent and Child § 12—

A warrant charging defendant with willfully neglecting to provide adequate support for his wife and two children is sufficient to express the charge against defendant and to apprise him of its nature, and defendant's motion in arrest of judgment on the ground that it omitted to charge that he had begotten the children, is properly denied, the question of paternity having been raised and submitted to the jury upon the conflicting evidence.

APPEAL by defendant from *Gwyn, J.,* at March Term, 1949, of GUILFORD. No error.

The defendant was convicted of willfully neglecting to provide adequate support for his wife and his two children, in violation of G.S. 14-325. From judgment predicated on the verdict of the jury, the defendant appeals, assigning errors in the trial.

Attorney-General McMullan, Assistant Attorney-General Moody, and John R. Jordan, Jr., Member of Staff, for the State.

Wm. Reid Dalton for defendant.

DEVIN, J. The evidence offered by the State was sufficient to support the verdict and judgment. It appeared that defendant's wife, a victim of polio and compelled to use crutches, was at the times alleged in the warrant living in the home of her mother who was employed in a local cotton mill. With them lived the two children of defendant and his wife, one aged 10, named Bobbie, and the other aged 2 years, named Jimmie. There was evidence that defendant while living part of the time with his wife willfully neglected to provide support for her and their children though he was able to work; that his earnings during this time amounted to $30 per month and board for farm work, and at other times to $25 per week when employed by the operator of a dairy.

The defendant's principal defense was that his wife had committed adultery, and that he was not the father of the child Jimmie who was born 1 October, 1946. It appeared from the State's evidence that in July, 1945, defendant had been committed to the State Hospital at Morganton; that he had escaped after a few weeks, was immediately recommitted, and again escaped and never returned to the hospital. Later, certificate was issued by the hospital that he was deemed of sound mind. Defendant testified his second enlargement from the hospital did not occur until July, 1946, but the State's evidence tended to fix the time of his second escape as in the fall of 1945, and there was evidence to show that he thereafter remained a portion of the time in Rockingham County at the home of his mother, and part of the time in Guilford County with his wife. During this time he made no adequate contribution to the support of his wife or either of the children, and before the warrant was issued in January, 1949, had ceased altogether to live with them.

In view of the defendant's affirmative defense that his wife had committed adultery, and that he was not the father of the youngest child, the trial judge submitted written issues to the jury as to the paternity of the child, the adultery of the wife, and as to whether or not the defendant had willfully neglected to provide adequate support for wife and child or children. To these issues the jury responded that defendant was the father of the child Jimmie, that his wife had not committed adultery, and to the issue of nonsupport of wife and child or children the jury answered

in both instances "Yes—Guilty." It appears from the record that the jury was instructed that the burden of proof was on the State to satisfy the jury from the evidence beyond a reasonable doubt of the guilt of the defendant as charged in the warrant, as well as in respect of each of the elements necessary to constitute the offense.

The defendant excepted to the submission of written issues to the jury and assigns error in the action of the court in so doing. In criminal actions, except in cases of special verdicts, or upon questions involving the sanity of the defendant, or where the question of paternity is involved in prosecutions under G.S. 49-2, or sometimes where specific questions of value are raised, the uniform practice is to submit to the jury only the general issue whether the defendant is guilty or not of the offense charged, to be orally answered, under appropriate instructions from the court, and the submission of several written issues is a practice "not to be advised in criminal cases," as was said in *S. v. Belk,* 76 N.C. 10. However, in this case we are unable to perceive how the defendant was prejudiced by the action of the court in submitting the issues complained of. The purpose of the trial judge was to aid the jury and to direct their attention specifically to the defenses set up by the defendant. There was no lessening of the *quantum* of proof required before he could be convicted, and the jury wrote their response "guilty" under the determinative issues submitted to them. *S. v. Bowser,* 230 N.C. 330, 53 S.E. 2d 282; *S. v. McCarty,* 210 Iowa 173; *S. v. Wells,* 162 S.C. 509 (531), 161 S.E. 177; 13 N. C. Law Review 321-323.

The defendant complains that during the trial the court on motion of the solicitor struck out of the warrant the words "while living with them," (that is wife and two children), and a few minutes later in his discretion allowed the solicitor to amend by re-inserting therein "while living with his wife," to conform to the language of the statute (G.S. 14-325). The record shows: "Motion to re-insert came at the same time with the motion to strike and was allowed during the same discussion." The striking and re-insertion of substantially the same words, done at practically one time, was within the discretion of the trial judge, and no harm therefrom resulted to the defendant. *S. v. Bowser, supra; S. v. Brown,* 225 N.C. 22, 33 S.E. 2d 121. The defendant's assignment of error on this ground cannot be sustained.

Defendant moves in arrest of judgment for insufficiency of the warrant, for that the warrant charged willful failure to provide adequate support for "his wife and two children" . . . "while living with his wife," but omitted the words of the statute, in referring to the children, "which he has begotten upon her." As the warrant properly charged non-support of the wife, it was sufficient to sustain the verdict and judgment on that count, and to withstand motion in arrest of judgment. *S. v. Wein-*

stein, 224 N.C. 645, 31 S.E. 2d 920. However, we think the language in the warrant in this case, while not using the words set out in the statute, was sufficient to express the charge against the defendant and to apprise him of its nature. *S. v. Howley,* 220 N.C. 113 (117), 16 S.E. 2d 705. At any rate, the defendant based his defense largely on the effort to show that one of the children had not been begotten by him. The conflicting testimony on this point was resolved by the jury, under appropriate instruction from the court, in favor of the State and the veracity of the wife. The motion in arrest of judgment was properly denied.

We have examined the other exceptions noted by the defendant and brought forward in his assignments of error but find none of sufficient moment to warrant disturbing the verdict and judgment.

No error.

PRATHER B. PITTMAN AND WIFE, QUINTALINE P. PITTMAN, v. MRS. AGNES PITTMAN STANLEY.

(Filed 14 December, 1949.)

1. Deeds § 13b—

A deed to grantor's wife "and to her heirs" by grantor, conveys a fee tail special, converted by our statute into a fee simple absolute. G.S. 41-1.

2. Deeds § 11—

While every part of a deed should be considered in order to determine the intent of the grantor, where he uses technical words having a clearly defined legal significance under an accepted canon of construction which has become a settled rule of law and of property, there is no room for construction to ascertain the intent and the words must be given their legal meaning and effect.

APPEAL by plaintiffs from *Burney, J.,* at May Term, 1949, of ROBESON. Affirmed.

The plaintiffs filed petition for partition of land, alleging tenancy in common with the defendant. The defendant pleaded sole seizin. Both parties claimed under deed from A. B. Pittman, the father of plaintiff Prather B. Pittman, to Agnes L. Pittman, the defendant, then the wife of the grantor, dated 2 January, 1909, conveying the land "to Agnes L. Pittman and to her heirs by A. B. Pittman." It was admitted that plaintiff was born subsequent to the execution of the deed, in May, 1909, and that A. B. Pittman died in August, 1909. The defendant thereafter married Stanley and bore him five other children. Stanley is now dead.

Plaintiffs claim that by the deed referred to the land was conveyed to the defendant and to the plaintiff Prather B. Pittman (the only child

of Agnes and A. B. Pittman) as tenants in common. The defendant claimed the deed in law conveyed fee simple title to the defendant. The court below so held, and the plaintiffs appealed.

David M. Britt and McLean & Stacy for plaintiffs.
Johnson & Johnson for defendant.

DEVIN, J. The determination of the question here presented depends upon the interpretation to be put upon the language in the deed "to Agnes L. Pittman and to her heirs by A. B. Pittman." At common law the estate thus conveyed was denominated a fee tail special (2 Blk. 113), but by our statute, G.S. 41-1, it is prescribed that "every person seized of an estate in tail shall be deemed to be seized of the same in fee simple," thus enlarging the fee tail estate into a fee simple absolute. *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906. We think the language of the deed of A. B. Pittman, under the decisions of this Court interpreting the statute, must be construed to convey a fee simple to the first taker.

Every part of a deed should be considered in order to determine the intent of the grantor, but this must be ascertained from the language he has used, giving to the words and phrases used their settled legal import. *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662; *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Morehead v. Montague,* 200 N.C. 497, 157 S.E. 793. The grantor's intent must be understood as that expressed in the language of the deed and not necessarily such as may have existed in his mind if inconsistent with the legal import of the words he has used. *Paul v. Paul,* 199 N.C. 522, 154 S.E. 825; *McIver v. McKinney,* 184 N.C. 393, 114 S.E. 399.

While it has been frequently said that the application of technical rules will not be permitted to defeat an intention which substantially appears from the entire instrument, accepted canons of construction which have become settled rules of law and of property cannot be disregarded. *Boyd v. Campbell,* 192 N.C. 398, 135 S.E. 121; *Williamson v. Cox, supra.* In *May v. Lewis,* 132 N.C. 115, 43 S.E. 550, speaking of the interpretation of a will, this Court said, "It is our duty as far as possible to give words used by a testator their legal significance unless it is apparent from the will itself that they were used in some other sense." In *Nobles v. Nobles,* 177 N.C. 243, 98 S.E. 715, *Justice Hoke,* speaking of the rule in *Shelley's case* and the technical words sufficient to invoke that rule, said, "The principle prevails as a rule of property both in deeds and wills and regardless of any particular intent to the contrary otherwise appearing in the instrument." *Wallace v. Wallace,* 181 N.C. 158, 106 S.E. 501. The terms employed by the grantor to designate the quality and extent of the estate conveyed are to be given their well-known legal or technical meaning

unless from the deed itself a different interpretation is manifest. *Ferguson v. Ferguson,* 225 N.C. 375, 35 S.E. 2d 231. "When language is used having a clearly defined legal significance, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect." *Campbell v. Cronley,* 150 N.C. 457, 64 S.E. 213; *Jackson v. Powell,* 225 N.C. 599 (600), 35 S.E. 2d 889; *McIver v. McKinney, supra.* When a grantor uses words and phrases which have a well-known legal or technical meaning he must be deemed to have used them in such sense; otherwise technical words have no certain meaning or effect. *Leathers v. Gray,* 101 N.C. 162, 7 S.E. 657.

The question here presented seems to have been decided by this Court in *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906, where a deed "to M. E. J. Kelly and her heirs by T. D. Kelly" with granting and *habendum* clauses as here designating grantee as "parties of the second part and their heirs," was held to convey a fee simple to the first taker, on the ground that the fee tail special was converted by the statute into a fee simple absolute. This ruling was in accord with other decisions of this Court, interpreting similar language in deeds, which were cited in the opinion written for the Court by *Chief Justice Stacy. Revis v. Murphy,* 172 N.C. 579, 90 S.E. 573 ("Avvie Revis, her heirs by the body of F. H. Revis"); *Jones v. Ragsdale,* 141 N.C. 200, 53 S.E. 870 ("Zilphia S. Jones and her heirs by her present husband"); *Paul v. Paul,* 199 N.C. 522, 154 S.E. 825 ("to Mattie Paul and the heirs of her body by Smith Paul begotten").

It is regarded as a matter of importance that established rules of law affecting the devolution and title to real property should be uniformly observed, so that those interested may understand their rights and those called upon to advise as to these matters may be able to do so with some degree of assurance. The stability of the law is essential to the security of titles. "For if the trumpet give an uncertain sound, who shall prepare himself to the battle." 1 Cor. 14:8.

In *Whitley v. Arenson, supra,* it was said: "When a grantor or testator uses technical words or phrases to express his intent in conveying or disposing of property, he will be deemed to have used such words or phrases in their well-known legal or technical sense, unless he shall, in some appropriate way, indicate a different meaning to be ascribed to them (citing authorities). So, also, if the use of such words or phrases bring his intention within a settled rule of law, like the rule in *Shelley's case,* the latter will prevail; otherwise, technical words would have no certain meaning, and the rule of law would itself become uncertain."

The appellants urge that the circumstances of this case and the reasonable inferences to be drawn therefrom take this case out of the rule, but

in the light of the former decisions of this Court we are unable to adopt that view.

Judgment affirmed.

HELEN PRENTZAS v. HAROLD E. MORROW, TRADING AS MORROW DRUG COMPANY.

(Filed 14 December, 1949.)

1. Abatement and Revival § 8—

A plea in bar for pendency of a prior action between the parties is bad when it appears that at the time of the plea the prior action had been terminated by voluntary nonsuit.

2. Ejectment § 3—

It is not required that there be a second notice to the tenant to vacate in order to sustain a subsequent action in ejectment after nonsuit, since such notice is not primarily a notice of intended legal action upon noncompliance, and does not lose its effectiveness because of the nonsuit.

DEFENDANT'S appeal from *Gwyn, J.*, April 4, 1949, Civil Term, GUILFORD Superior Court.

The plaintiff instituted summary proceedings in ejectment against the defendant in the Civil Division of the Municipal-County Court of the City of Greensboro, alleging that the defendant entered into possession of a storeroom in Greensboro as tenant of the plaintiff and holds over, refusing to surrender possession to plaintiff after his term has expired.

Plaintiff further alleges that the defendant owes her the sum of $516.00 as unpaid rents during the period of his occupancy.

The case was heard in that court, and there was judgment in favor of the plaintiff, and defendant appealed to the Superior Court of Guilford County, where the case was heard *de novo*.

The relevant evidence taken on this trial is substantially as follows:

Plaintiff's Evidence. The plaintiff testified that she owned the building involved in the proceeding; that her husband, John Prentzas, is her agent, with authority to so act with reference to all matters connected with the rental, management, and control of the property.

John Prentzas testified that there had been no rent paid since November 30, 1948. That he had given notice to Morrow to vacate subsequent to December 1, and on failure had brought an action for possession. It turned out that the action had been brought the day before the notice had expired, and his attorneys took a voluntary nonsuit. The present proceeding was instituted immediately after that nonsuit.

The witness testified further that the property was rented to the defendant on a month-to-month basis. He testified that notice was given defend-

ant on the first or second of November to vacate the first of December. The plaintiff had no agreement with defendant about a thirty-day notice. The notice was put in evidence,—dated November 2, and demanding that the defendant vacate the premises within thirty days.

On cross-examination the witness stated that when the other action for ejectment was brought Morrow was entitled to one more day of possession. That he went to the City Court right after the judgment of nonsuit was taken; and that he did not know when the judgment was signed. That he paid the costs that day to Mr. Kimbro. He testified, however, that he had notified Morrow to vacate the property subsequent to December 1.

Defendant moved for judgment of nonsuit, which was declined, and defendant excepted.

Defendant's Evidence. Defendant offered in evidence the affidavit and summons in the present proceeding, dated February 21, 1949; and the affidavit and summons in an action dated December 1, 1948, before J. E. Paschal, J. P., and appeal therein by defendant, filed in the office of the Clerk of the Superior Court December 3, 1948, and judgment in the latter court dismissing the action on voluntary nonsuit by the plaintiff, and taxing plaintiff with costs.

The defendant, at the close of the evidence, renewed his motion to dismiss as of nonsuit, which was declined, and defendant excepted.

The evidence was submitted to the jury, which found the issues in favor of the plaintiff. Motion to set aside the verdict was declined, and judgment rendered requiring defendant to vacate the premises, and adjudging recovery by plaintiff of unpaid rent. Defendant excepted and appealed.

Smith, Wharton, Sapp & Moore for plaintiff, appellee.

Wm. E. Comer for defendant, appellant.

SEAWELL, J. The appellant bases his right to a dismissal of this proceeding on two grounds: First, that there was another suit pending involving the same subject matter when the instant case was begun. But he succeeded in showing that the prior case had been dismissed long before the present case was called for a hearing, and that it was not pending when he made his plea in bar. *Grubbs v. Ferguson,* 136 N.C. 60, 48 S.E. 551; *Cook v. Cook,* 159 N.C. 48, 74 S.E. 639; *Brock v. Scott,* 159 N.C. 513, 75 S.E. 724. In fact, if he ever made it in that form in the lower court it does not so appear in the record. Second, he contends that the present case is brought without statutory notice to the tenant to surrender the premises.

Notice to the tenant to vacate, while necessary to support an action in summary proceedings in ejectment, is not primarily a notice of intended

legal action if he does not comply. It is intended to prevent his being summarily thrown out of possession, with no opportunity to readjust himself, when he has reason to believe the rental status will continue. It is an extrajudicial transaction between the parties, which, when found to be a fact, is sufficient to sustain a subsequent action by the court in a trial on the merits, notwithstanding prior nonsuit. The notice was in substantial compliance with the statute and did not lose its effectiveness because of the nonsuit.

We find

No error.

CAROLINA POWER & LIGHT COMPANY v. WILLIAM MURPHY BOWMAN AND WIFE, BETTY B. BOWMAN, AND W. W. SNOW.

(Filed 14 December, 1949.)

1. Pleadings § 23—

The trial court has discretionary power to allow a party to amend his pleading after certification of the decision of the Supreme Court on appeal, to allege facts relied on as an estoppel, and the exercise of such discretion is not subject to review except for palpable abuse.

2. Pleadings § 7—

Defendants may interpose varying and contradictory defenses.

3. Appeal and Error § 40f—

The Supreme Court will reverse an order denying a motion to strike when the matter complained of is irrelevant and would tend to prejudice movant when read to the jury even though evidence in support thereof is not admitted at the trial; but in the absence of such prejudice the Supreme Court will not attempt to chart the course of the trial by passing upon the relevancy or effect of the averments, but will leave the matter to be determined by rulings upon the evidence offered in support of the allegations.

APPEAL by plaintiff from *Burney, J.*, May Term, 1949, ROBESON. Affirmed.

Civil action for injunctive relief, here on former appeal. *Light Co. v. Bowman,* 229 N.C. 682.

After the opinion of this Court on the former appeal was certified down, the court below, on motion of defendants, entered an order permitting defendants to file an amendment to their answer. Plaintiff excepted. Thereupon, defendants filed the proposed amendment in which they plead certain facts by way of estoppel. The plaintiff moved (1) to strike the amendment "for that the same is not amendatory of but is inconsistent with the original Answer and Amendments thereto, and for

that all matters alleged in said Amendment to the Complaint are *res adjudicata;*" and (2) to strike certain portions of paragraphs 11, 12, and 13 thereof for that the facts alleged are immaterial, redundant, and repetitious. The motion was denied and plaintiff appealed.

A. Y. Arledge and Varser, McIntyre & Henry for plaintiff appellant.

McKinnon & McKinnon and Malcolm B. Seawell and McLean & Stacy for defendant appellees.

BARNHILL, J. The exception to the order permitting defendants to amend their answer is without merit. Whether the amendment should be allowed rested within the sound discretion of the court below. G.S. 1-163; *Bank v. Sturgill,* 223 N.C. 825, 28 S.E. 2d 511; *Hughes v. Oliver,* 228 N.C. 680, 47 S.E. 2d 6; *Hatcher v. Williams,* 225 N.C. 112, 33 S.E. 2d 617. Its ruling thereon is not subject to review on appeal except for palpable abuse. *Gordon v. Gas Co.,* 178 N.C. 435, 100 S.E. 878; *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789; *Osborne v. Canton,* 219 N.C. 139, 13 S.E. 2d 265; *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466; *Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471. The defendants are not required to be consistent. They may interpose various and contradictory defenses. Nor has anything been adjudicated herein other than that, upon the evidence appearing in the record on the former appeal, the plaintiff is entitled to a peremptory instruction. *Light Co. v. Bowman,* 229 N.C. 682.

This Court will not at this time overrule the judgment of the court below in respect to particular allegations contained in the amendment. Plaintiff seeks, in effect, to have us say that the facts alleged are not sufficient to support the plea of estoppel and are therefore irrelevant and immaterial. But it is not our province to predetermine the competency of evidence or to chart the course of the trial in the court below. *Parker v. Duke University,* 230 N.C. 656, and cases cited; *Terry v. Coal Co., ante,* 103. Whether evidence of the facts alleged is competent in support of the plea must be determined, in the first instance, when and if it is tendered at the hearing. *Terry v. Coal Co., supra.* Its relevancy may best be determined at that time.

In an appeal from an interlocutory order which does not destroy, or impair, or seriously imperil some substantial right of the appellant, unless corrected before the trial, this Court, ordinarily, will not interfere with the order entered. *Privette v. Privette,* 230 N.C. 52. If a pleading contains impertinent matter, unrelated to the cause of action or defense and not competent to be shown in evidence which, when read to the jury, may well tend to prejudice the movant even though evidence thereof is not admitted, this Court will not hesitate to reverse an order denying a

motion to strike. *Parlier v. Drum, ante,* 155; *Privette v. Privette, supra.* Otherwise, it is the better practice to leave the questions of relevancy and competency of evidence to be ruled on by the trial judge while he has the whole matter before him. He is then in the better position to appraise the relevancy of the testimony and determine its bearing on the case as a whole.

Here, if the additional averments constitute a rehash of the allegations already made, as plaintiff asserts, it is not hurt. If they form the basis of a valid defense, the court below had the right, in its discretion, to afford the defendants an opportunity to interpose the plea.

We have purposely refrained from discussing the nature, force and effect of the allegations plaintiff seeks to have stricken in order to avoid possible prejudice to either party. We will rule on the questions it seeks to raise when and if they are presented in orderly course after final judgment.

The judgment below is

Affirmed.

D. H. PARKER v. RALPH E. HELMS, AND JILL E. HELMS, TRADING AS ERSKINE JEWELRY COMPANY; AND ERSKINE'S, INC.

(Filed 14 December, 1949.)

1. Reference § 3—

Where the verdict of the jury establishes that plaintiff is entitled to commissions on the gross receipts of defendant store and a bonus on the increase of the total gross receipts over those of the same period of the preceding year, as extra compensation under his contract of employment, the ascertainment of the amount requires an examination of a long account, and the court is empowered to order a compulsory reference to determine such amount. G.S. 1-189.

2. Same: Appeal and Error § 2—

An appeal from an order of compulsory reference in those instances authorized by statute is premature and will be dismissed.

APPEAL by defendants from *Coggin, Special Judge,* at the February Term, 1949, of RICHMOND.

The complaint alleges that the individual defendants, Ralph E. Helms and Jill E. Helms, trading as the Erskine Jewelry Company, operated a jewelry store in Rockingham, North Carolina, from 8 April, 1946, until 29 October, 1946; that during this period the plaintiff, D. H. Parker, served as manager of the store pursuant to a contract of employment with the individual defendants whereby they agreed to pay him "a salary of

$50.00 per week, plus a commission of 2% of the total gross receipts of said store, plus a bonus of 10% of the increase of the total gross receipts over the total gross receipts for the corresponding period of the preceding year"; that the individual defendants organized a corporation under the name of Erskine's, Incorporated, on 29 October, 1946; that the corporate defendant, Erskine's, Incorporated, "took over the ownership of the store" on 30 October, 1946, and the plaintiff acted as manager of the store for the corporate defendant from that date until 15 February, 1947, under a contract identical in terms with "the one he had had with the individual defendants"; that the total gross receipts of the store during the time the plaintiff worked for the individual defendants amounted to $28,458.41, which sum represented an increase of $10,348.38 over the gross receipts for the corresponding period of the preceding year, and the total gross receipts of the store during the time the plaintiff labored for the corporate defendant was $24,753.95, which sum represented an increase of $3,684.73 over the gross receipts for the corresponding period of the preceding year; that by reason of the premises the individual defendants became indebted to plaintiff in the sum of $1,604.00 as commission and bonus, and the corporate defendant became liable to plaintiff for $863.53 as commission and bonus; that despite repeated demands by plaintiff, the defendants have failed "to pay plaintiff the commission of 2% and the bonus of 10% as provided for in said contract"; and that the plaintiff is entitled to recover the respective debts of the defendants to him in this action.

The defendants filed a joint answer, denying liability. They admitted that plaintiff worked in the jewelry store at Rockingham during the times stated in the complaint, but they alleged that the only compensation he was to receive by virtue of his employment was a weekly salary of $50.00, which had been paid in full.

The parties offered testimony at the trial tending to sustain their respective pleadings. The court informed the parties during the course of the trial "that he would submit to the jury only the issues as to the contract, and would of his own motion refer the question of the amounts due the plaintiff, if the jury should find for the plaintiff."

In consequence, the court presented these issues to the jury: (1) Did the plaintiff and the individual defendants, Ralph E. Helms and Mrs. Jill E. Helms, enter into a contract, as alleged in the complaint? (2) If so, did the defendant corporation, Erskine's, Incorporated, adopt said contract?

The jury answered both issues in the affirmative, and the court entered an order referring "the question as to the amounts due plaintiff by the defendants" to W. S. Thomas, Esquire, as Referee on the ground "that the question of the amount due requires the examination of a long account."

The defendants excepted and appealed, assigning as error the order of reference and various rulings of the court on the trial of the two issues before the jury.

Pittman & Pittman and Carroll & Steele for plaintiff, appellee.
Varser, McIntyre & Henry for defendants, appellants.

ERVIN, J. The issues of fact arising on the pleadings in regard to the existence of contracts entitling plaintiff to compensation in addition to the weekly salary were answered by the jury in favor of the plaintiff. The verdict thus established the right of the plaintiff to an accounting in respect to the extra compensation, and the court was empowered to order a compulsory reference to hear and determine that matter by the statutory provision authorizing such action "where the trial of an issue of fact requires the examination of a long account on either side." G.S. 1-189.

The order directing the compulsory reference to state the account leaves something more to be done in the case. This being so, it is interlocutory, and not appealable. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 676. The reference should proceed. After the referee has made his report, and that has been passed on, and the final judgment has been rendered, any party aggrieved by the final judgment may appeal to this Court, and then obtain a review of all exceptions noted by him at any stage of the trial. *Leroy v. Saliba,* 182 N.C. 757, 108 S.E. 303; *Waste Co. v. Mfg. Co.,* 168 N.C. 92, 83 S.E. 609; *Richardson v. Express Co.,* 151 N.C. 60, 65 S.E. 616; *Jones v. Wooten,* 137 N.C. 421, 49 S.E. 915.

This case is to be distinguished from those in which a compulsory reference is not authorized by law, 4 C.J.S., Appeal and Error, section 129; and from those in which an undetermined plea in bar precludes a reference. *Lumber Co. v. Pemberton,* 188 N.C. 532, 125 S.E. 119; *Pritchett v. Supply Co.,* 153 N.C. 344, 69 S.E. 249.

Since the appeal of the defendants is premature, it must be dismissed.

Appeal dismissed.

JOHN JONES v. HENDERSON TOBACCO CO., ET AL.

(Filed 14 December, 1949.)

Automobiles § 24b—

Where plaintiff's own evidence tends to show that one defendant merely loaded its tobacco on the truck of a common carrier and that it had nothing further to do with the transportation of the goods after the bill of lading had been given therefor, such defendant's motion to nonsuit on

the issue of *respondeat superior* in an action to recover for injuries received as a result of the alleged negligent operation of the truck, is without error.

APPEAL by plaintiff from *Edmundson, Special Judge,* at May Term, 1949, of RICHMOND.

Civil action to recover damages for an alleged negligent injury resulting from a collision between a truck owned by Alton Brown, operated at the time by Leroy Eaddy, and a truck belonging to the Town of Rockingham upon which the plaintiff was riding as an employee of said Town at the time.

Alton Brown, an independent carrier by motor truck, was engaged by the Henderson Tobacco Company to transport a truck load of tobacco from Lake City, S. C., to Danville, Va., on or about 9 August, 1945. Following delivery of the tobacco in Danville and on the return trip, the empty truck, driven at the time by Leroy Eaddy, collided with a truck belonging to the town of Rockingham, Richmond County, N. C., within the limits of said town and injured the plaintiff, an employee riding on the town truck.

The plaintiff has sued Alton Brown, the carrier, and Leroy Eaddy, the driver of his truck, and also the Henderson Tobacco Company.

There was a verdict and judgment for plaintiff against Brown and his driver, and nonsuit entered as to the Henderson Tobacco Company.

Judgment of nonsuit was also entered in favor of Lev W. Brown, from which no appeal is prosecuted.

The plaintiff appeals from the judgment of nonsuit dismissing the action as to the Henderson Tobacco Company.

Blackwell & Blackwell and Jones & Jones for plaintiff, appellant.

Bynum & Bynum for defendant, appellee.

STACY, C. J. The plaintiff seeks to hold the Henderson Tobacco Company liable for his injuries on several theories, but his case is left without substance as against the Tobacco Company by the testimony of his own witness, Alton Brown: "They (Tobacco Company) buy tobacco on commission. . . . They don't have any trucks at all. . . . Q. So their business in South Carolina is buying and transportation of tobacco? A. Not transportation, they haven't got anything to do with that at all."

The witness further testified that when the tobacco was loaded on his truck and bill of lading given therefor, the Henderson Tobacco Company had nothing further to do with its transportation; that his own liability in respect of the particular load in question ended with the delivery of the tobacco in Danville, and that he was then at liberty to go where he pleased

or do as he pleased with his truck. He could have picked up a return load, or instructed the driver to go elsewhere with the truck. As a matter of fact, on the occasion in question it was homeword bound, running empty, on the return trip from Danville.

This would seem to exculpate the Henderson Tobacco Company, the shipper, from any liability for the injury in suit. Such is the plaintiff's own evidence, and the judgment of nonsuit as to the Tobacco Company would seem to be correct.

The plaintiff cites *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71, but the principle upon which that case was decided would seem to be inapplicable to the facts of the present record.

Affirmed.

STATE v. JOHN JERNIGAN.

(Filed 14 December, 1949.)

1. Homicide § 25—

Defendant's confession introduced by the State tended to show that as a result of an altercation, deceased had made a pass at defendant, grabbed his watch and chain, and had reached back to get a bottle to throw at defendant, when defendant shot him. *Held:* Upon defendant's own statement it was a question for the jury as to whether defendant used excessive force or was justified in taking the life of the deceased, and the refusal of defendant's motion to nonsuit was not error.

2. Homicide § 11—

Self-defense is an affirmative plea, with the burden of satisfaction cast upon the defendant.

APPEAL by defendant from *Edmundson, Special Judge,* June Term, 1949, of COLUMBUS.

Criminal prosecution on indictment charging the defendant with the murder of one Rondal Dupree.

Rondal Dupree was shot at the defendant's place of business at Lake Waccamaw, Columbus County, on the morning of 30 October, 1948, with a 38-caliber pistol, and he died as a result thereof that afternoon. The defendant told the officers that the deceased came into his place of business, purchased two or three small items, including chewing gum and cigarettes, and gave him a dollar bill; that he gave him his proper change, but the deceased contended that he had been short-changed; whereupon he made a pass at the defendant, grabbed his watch and chain, and reached back to get a bottle. As he raised the bottle to throw it, the defendant shot him.

The defendant offered no evidence, but contended that his confession to the officers, which the State offered on the hearing, made out a clear case of self-defense, whereupon he demurred and rested.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for a term of not less than five nor more than seven years.

Defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Junius K. Powell, Catherine P. Lee, and Junius B. Lee, Jr., for defendant.

STACY, C. J. There was no error in submitting the case to the jury. Even on the defendant's own statement, *S. v. Edwards,* 211 N.C. 555, 191 S.E. 1, it was a question for the twelve whether he used excessive force or was justified in taking the life of the deceased. *S. v. DeGraffenreid,* 223 N.C. 461, 27 S.E. 2d 130; *S. v. Baker,* 222 N.C. 428, 23 S.E. 2d 340; *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427. Moreover, giving the defendant full benefit of all he says, his statement hardly brings him within the principle of self-defense, certainly not as a matter of law dispensing with any determination of the facts by the jury. *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161; *S. v. Koutro,* 210 N.C. 144, 185 S.E. 682; *S. v. Marshall, supra; S. v. Glenn,* 198 N.C. 79, 150 S.E. 663; *S. v. Robinson,* 188 N.C. 784, 125 S.E. 617.

The defendant relies on the cases of *S. v. Ray,* 229 N.C. 40, 47 S.E. 2d 494; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Fulcher,* 184 N.C. 663, 113 S.E. 769, but in none of these cases was there a question of self-defense, or circumstances calling for explanation or exculpation on the part of the defendant. They are clearly distinguishable. Self-defense is an affirmative plea, with the burden of satisfaction cast upon the defendant. *S. v. DeGraffenreid, supra; S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *S. v. Baker, supra; S. v. Benson,* 183 N.C. 795, 111 S.E. 867.

The exceptions to the charge on reasonable doubt are feckless in the light of the verdict, the defendant's confession, and the record. *S. v. Wood,* 230 N.C. 740, 55 S.E. 2d 491; *S. v. Bryant, ante,* 106.

No disturbance of the result of the trial is required by any of the assignments brought forward on the record.

No error.

F. F. ALLEN, JR., v. F. C. (JOE) COSTNER AND M. O. BAKER.

(Filed 14 December, 1949.)

Pleadings § 22b—

The trial court has discretionary power to permit defendant to amend the answer and plead estoppel arising upon plaintiff's admissions on the trial.

PLAINTIFF'S appeal from *McSwain, Special Judge,* May Civil Term, 1949, GASTON Superior Court.

J. L. Hamme for plaintiff, appellant.

James Mullen for defendant M. O. Baker, appellee.

P. W. Garland and S. B. Dolley for defendant F. C. Costner, appellee.

SEAWELL, J. The plaintiff bought a tract of land from M. O. Baker which was being farmed, in part, by Costner on a rent-share basis, Baker to furnish the fertilizer, and the crop, (of wheat), divided between the landlord and sharecropper on a 50-50 basis. By this arrangement Costner became the tenant of Allen on the terms of the Baker contract.

Allen demanded that Costner carry one-half of the wheat crop to his barn and Costner refused because the fertilizer bill had not been paid by Baker according to the rental contract.

Allen contended he had been told by Baker that the fertilizer bill had been paid, which Baker denied, contending that Allen had been informed that it had not.

The wheat crop was sold, and Allen, alleging that Costner had raised more wheat than he had accounted for, sued to recover for the balance. Baker was made a party to recover for the fertilizer bill deducted from the proceeds of the sale of the crop.

At the trial the plaintiff demanded that a "bill of particulars," or account of the wheat sale, be filed. Defendant Costner did this, paying what he said was Allen's share into court.

On the trial the plaintiff produced a number of witnesses who, over defendant's objection, were permitted to testify that they had viewed the crop—and variously estimated it. The opinion evidence was wanting in sufficient probative value to affect the result.

On the trial, Allen, having admitted that he had been informed by Baker that the fertilizer bill had not been paid, pending the sale of the land, and had voluntarily paid the full purchase price thereafter, defense moved to amend the answer and plead estoppel. The amendment was allowed and plaintiff excepted.

At the conclusion of plaintiff's evidence, the defendants offering none, both defendants demurred and moved for judgment as of nonsuit. These motions were allowed. Plaintiff excepted and appealed.

A diligent search reveals no principle on which we might interfere with the conclusion reached, and the judgment is, therefore,

Affirmed.

STATE v. BENNIE DANIELS AND LLOYD RAY DANIELS.

(Filed 14 December, 1949.)

Criminal Law § 82—

Petition in the Supreme Court for permission to apply to the Superior Court for a writ of error *coram nobis* must make out a *prima facie* showing of substance.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Herman L. Taylor for defendants, petitioners.

PER CURIAM. The defendants were tried at March Term, 1949, of the Superior Court of Pitt County, convicted of first degree murder, the jury not recommending mercy, were sentenced to death, and appealed. Counsel for defendants, having failed to serve case on appeal within the time allowed, sought by *certiorari* to have the appeal sent up. *Certiorari* was denied, defendants not having shown sufficient grounds therefor under the rules and practice of the Court. *S. v. Daniels, ante,* 17; *In re Taylor,* 230 N.C. 566; *In re Taylor,* 229 N.C. 297, 49 S.E. 2d 749, q.v.

Counsel for petitioners were advised, however, that petition might be filed here for permission to apply to the Superior Court of Pitt County, where the cause was tried, for a writ of error *coram nobis,* through which, if allowed there, they might be heard on the main features on which they asked for relief, which included matters *dehors* the record, and that appeal would lie to the Supreme Court in the event of its unfavorable action. *S. v. Daniels, supra; In re Taylor* (230 N.C.), *supra; In re Taylor* (229 N.C.), supra.

The defendants now file a petition for permission to apply to the Superior Court for such a writ. Their petition does not make a *prima facie* showing of substance which is necessary to bring themselves within the purview of the writ. Citations, *supra.*

The petition is insufficient to justify the Court in issuing the writ and instigating the incident procedure in the court below. *S. v. Daniels, supra; In re Taylor* (229 N.C.), *supra.*

The petition is, therefore, denied.

J. F. GIBSON, TRADING AS GIBSON HARDWARE COMPANY, v. FREDERICK A. LACKEY.

(Filed 14 December, 1949.)

APPEAL by plaintiff from *Edmundson, Special Judge,* and a jury, at the May Term, 1949, of the Superior Court of Richmond County.

The plaintiff brought this action to enforce a contractual obligation of the defendant to pay his proportionate part of the cost of extending the dividing wall between the store of the plaintiff, and an adjoining store which the defendant had bought from the plaintiff shortly before the extension contract was made. The defendant pleaded a counterclaim for damages for fraud, alleging, in substance, that he had been induced to purchase his store to his injury by the false and fraudulent representation of the plaintiff that the entire original wall separating the two stores was of brick.

The parties stipulated at the trial that the plaintiff was entitled to recover the total sum of $1,770.75 of the defendant upon the cause of action set forth in the complaint, and in consequence the only issues left to the jury were those arising upon the counterclaim and the reply denying it. These were as follows:

1. Did the plaintiff falsely and fraudulently represent to the defendant that the wall in question was constructed of brick, as alleged in the answer of the defendant?

2. If so, what sum as damages therefor is the defendant entitled to recover of the plaintiff?

Each party offered testimony tending to sustain his position upon these issues. The jury answered the first issue "Yes," and the second issue "$1,800.00"; and the court entered a judgment awarding the defendant the difference between his recovery and his debt to plaintiff, *i.e.,* $29.25, and the costs. The plaintiff excepted and appealed, assigning errors.

Z. V. Morgan and Bynum & Bynum for plaintiff, appellant.

Jones & Jones for defendant, appellee.

PER CURIAM. The trial narrowed itself to a legal battle over sharply contested issues of fact. These were resolved in favor of defendant and against plaintiff by the agency created for that purpose by the Constitution, *i.e.,* the petit jury. A painstaking consideration of all of the assignments of error convinces us that none of them are of sufficient moment to justify a new trial. For this reason, the judgment will be upheld.

No error.

ANNA S. LAPRADE, ADMINISTRATRIX OF THE ESTATE OF ALFRED REUBEN LAPRADE, DECEASED, v. NORTH CAROLINA RAILROAD COMPANY AND THE SOUTHERN RAILWAY COMPANY.

(Filed 14 December, 1949.)

APPEAL by plaintiff from *Phillips, J.*, August Term, 1949, of GUILFORD. No error.

This was an action to recover damages for the wrongful death of plaintiff's intestate resulting from being struck by defendants' train at a grade crossing in High Point. Plaintiff alleged this was due to the negligence of the defendants. The defendants denied negligence on their part and alleged that the death of plaintiff's intestate was due to his own contributory negligence. Upon issues submitted the jury for their verdict found that the death of plaintiff's intestate was caused by the negligence of defendants, but that plaintiff's intestate by his own negligence had contributed to his injury and death.

From judgment for defendants in accord with the verdict, plaintiff appealed.

Haworth & Mattocks and James B. Lovelace for plaintiff, appellant.

W. T. Joyner and Roberson, Haworth & Reese for defendants, appellees.

PER CURIAM. The plaintiff appealed from an adverse judgment based upon the verdict of the jury on the issue of contributory negligence. An examination of the record in the light of the several exceptions noted by the plaintiff fails to disclose any substantial error in the trial of the case, either in the admission of testimony or in the court's instructions to the jury. The case involved controverted questions of fact which on the determinative issue of contributory negligence the triers of the facts have resolved against the plaintiff. The result will not be disturbed.

No error.

MONTISE CLODFELTER v. THE NORTH CAROLINA GAS CORP.

(Filed 14 December, 1949.)

APPEALS by plaintiff and defendant from *Phillips, J.*, September Term, 1949, of DAVIDSON.

Civil action to recover damages for an alleged negligent injury resulting from the explosion of low quality of gas and defective equipment

installed by the defendant in the kitchen stove of the "New Hotel Lexington," Lexington, N. C.

In apt time, the defendant moved (1) to strike certain portions of the complaint as being "irrelevant, redundant and unnecessarily repetitious," and (2) to make the complaint more definite and certain.

Both motions were allowed in part and denied in part, from which rulings the plaintiff and defendant each in apt time, "objected and excepted to the rulings adverse to their respective contentions, all set forth in said judgment," and each gave notice of appeal.

J. F. Spruill for plaintiff, appellant.

Don A. Walser for defendant, appellant.

PER CURIAM. Apparently, both appellants are relying on the same assignment of error as only one appears on the record. It points out no particular ruling to which the parties object. Hence, the only question presented is whether error appears on the face of the record. We find none. *Terry v. Ice & Coal Co., ante,* 103; *Parker v. Duke University,* 230 N. C., 656, 55 S.E. 2d 189.

The judgment will be affirmed on both appeals.

Affirmed.

S. A. MOSER, JR., BY HIS NEXT FRIEND, S. A. MOSER, SR., v. NEIL W. JONES AND WILMA J. JONES, TRADING AS JONES AUTOMOTIVE COMPANY.

(Filed 14 December, 1949.)

APPEAL by plaintiff from *Phillips, J.,* August Term, 1949, GUILFORD.

Civil action to recover damages for personal injuries suffered by plaintiff while operating an electric saw.

From judgment of nonsuit plaintiff appealed.

Frazier & Frazier and J. A. Cannon, Jr., for plaintiff appellant.

McNairy & Harris and Smith, Wharton, Sapp & Moore for defendant appellees.

PER CURIAM. The court below was of the opinion that the evidence offered by plaintiff is insufficient to make out a case for the jury. In that conclusion we concur. Therefore, the judgment entered is

Affirmed.

ANNA PARHAM SINCLAIR, INDIVIDUALLY AND AS EXECUTRIX OF, AND SOLE DEVISEE AND LEGATEE UNDER THE LAST WILL AND TESTAMENT OF N. A. SINCLAIR, DECEASED, v. EFFIE S. TRAVIS, A WIDOW; RUTH TRAVIS AND DOROTHY TRAVIS.

(Filed 3 February, 1950.)

1. Gifts § 1—

A letter written by the payee in transmitting to the maker a note for execution, declaring that the payee had and does will the indebtedness thereby evidenced to his grandchildren, the children of the maker, so that in case of his previous death the notes would be the property of his grandchildren, is insufficient to constitute a gift *inter vivos* to his grandchildren, there being nothing in the language to show present donative intent, and there being neither actual nor constructive delivery of the notes to them.

2. Trusts § 3a—

A letter written by the payee in transmitting to the maker a note for execution, declaring that the payee had and does will the indebtedness thereby evidenced to his grandchildren, the children of the maker, so that in case of his previous death the notes would be the property of his grandchildren, is insufficient to establish an express trust.

3. Wills § 4—Asserted contract to devise notes to maker's children held not supported by consideration and unenforceable.

The maker of a note executed a deed of trust securing the note and such other indebtedness as might be incurred by the maker to the payee within three years thereafter. Within the three year period, the maker became further indebted to the payee, and executed another note for such amount, bearing the notation that it was secured by the deed of trust. The maker testified that the payee wrote a letter in transmitting the second note to her for execution, which declared that the payee had or does will the indebtedness to his grandchildren, the maker's children, so that in case of his previous death the notes would become the property of his grandchildren, and that she signed the second note because of the letter. *Held:* The maker was already under contractual obligation to sign the second note, and therefore the letter cannot constitute a valid consideration for an asserted contract to devise the notes to the maker's children.

APPEAL by plaintiff from *Bobbitt, J.,* at May 1949 Civil Term, of MOORE.

Civil action brought against defendant Effie S. Travis to recover on two certain promissory notes given by her to N. A. Sinclair, and for the foreclosure of a deed of trust allegedly securing the notes,—in which action Ruth Travis and Dorothy Travis were later made defendants, and filed answer.

In the pleadings filed by the parties these admissions were made, and, upon the trial in Superior Court, were offered in evidence:

(1) That the plaintiff is a resident of Franklin County, State of North Carolina, and is the duly appointed, qualified and acting executrix

of, and the sole devisee and legatee under the last will and testament of N. A. Sinclair, deceased;

(2) That on 26 January, 1937, for value received, defendant Effie S. Travis executed and delivered to N. A. Sinclair a promissory note under seal in the sum of $2,423.00, payable to the order of N. A. Sinclair one year after date, with interest, bearing this notation "Secured by deed of trust of even date to Robert H. Dye, Trustee";

(3) That on 25 March, 1938, for value received, defendant Effie S. Travis executed and delivered to N. A. Sinclair a promissory note under seal in the sum of $1,270.00, payable to the order of N. A. Sinclair one year after date—bearing this notation: "Secured by deed of trust to R. H. Dye";

(4) That on 26 January, 1937, in order to secure the payment of the promissory note in the sum of $2,423.00, defendant Effie S. Travis, executed and delivered to Robert H. Dye, Trustee, as party of the second part, a deed of trust in Moore County, N. C., duly probated and registered on 3 May, 1937, in Book of Mortgages No. 63 at page 5 in office of register of deeds of Moore County, North Carolina—the deed of trust containing the recital that "Whereas it has been agreed that the payment as well of said indebtedness as of such other indebtedness as may be incurred by her to him, within three years from this date, to be evidenced by her bonds to his order with a notation thereon indicating this security, and bearing interest at the rate of 6% per annum, payable annually, the entire indebtedness not exceeding the principal sum of five thousand dollars ($5,000.00), shall be secured by a conveyance of lands hereinafter described";

(5) That N. A. Sinclair died on 19 August, 1942, leaving a last will and testament, which was duly admitted to probate before Clerk of Superior Court of Cumberland County, N. C., on 25 August, 1942, which reads as follows:

"North Carolina

"Cumberland County

"I, N. A. Sinclair, of the County and State aforesaid, being of sound and disposing mind and memory, but considering the uncertainty of my earthly existence, do make, publish and declare this my Last Will and Testament, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made:

I.

"I give, bequeath and devise unto my beloved wife, Anna Parham Sinclair, all of my property, of every nature and kind, and wheresoever situate; to have and to hold unto her, absolutely and in fee simple.

II.

"I appoint my said wife, Anna Parham Sinclair, Executrix of this my Last Will and Testament, and direct that no bond shall be required of her.

"In Witness whereof, I, N. A. Sinclair, have hereunto set my hand and seal, this the 27th day of June, 1942.

(Signed) N. A. SINCLAIR (Seal)

"Signed, sealed, published and declared by N. A. Sinclair as his Last Will and Testament in the presence of us, who, at his request, and in his presence, and in the presence of each other, do subscribe our names as witnesses thereto.

(Signed) HERMAN R. CLARK
ROBERT H. DYE,
Both of Fayetteville, N. C.";

(6) That by instrument, dated 27 October, 1943, and duly recorded, as indicated, Robert H. Dye, the trustee named in the said deed of trust, renounced the trusts conferred upon him as set out and described in the said deed of trust;

(7) That defendant Effie S. Travis has never made any payments either to N. A. Sinclair or to plaintiff on either one of the said two notes. And for purpose of obtaining trial at May Term, 1949, defendants admit that the said two notes of Effie S. Travis were found by plaintiff among the effects of N. A. Sinclair after his death.

Plaintiff further alleges, in her complaint, in substance, that she is the owner and holder of the said two promissory notes, and defendant Effie S. Travis is justly indebted to her in the sum of $2,423.00 with interest as stated, as evidenced by the said promissory note, dated 26 January, 1937; and that in addition thereto said defendant is further indebted to her in the additional sum of $1,270.00, with interest as stated, as evidenced by the promissory note dated 25 March, 1938; and that the whole of same indebtedness is due and unpaid, after demand and payment refused.

Defendants, answering, deny the further allegations set out in preceding paragraph, and for further defense to the matters and things alleged in the complaint, and as a counterclaim and cross-action in favor of defendants and against plaintiff, defendants make these averments:

(1) That defendant Effie S. Travis, a widow, is the daughter, and the defendants Ruth Travis and Dorothy Travis, her children, are the grandchildren of N. A. Sinclair, the testator of plaintiff executrix,—these grandchildren being greatly loved by their said grandfather during his lifetime;

(2) That at the time the note for $2,423.00 was executed by defendant Effie S. Travis to her father, N. A. Sinclair, he had reached an advanced age and was in feeble health, and a widower of a few years; that prior to the death of her husband, a short time before 26 January, 1937, he and she had acquired ownership of the property described in the complaint, in Southern Pines, Moore County, N. C., and after the death of her husband, she continued to reside with her children in her said residence in Southern Pines, and after the death of the husband of defendant Effie S. Travis, and the father of her co-defendants, she found herself embarrassed in debt and her said father, the said N. A. Sinclair, voluntarily came to her assistance and advanced to her $2,423.00 evidenced by her note mentioned in the complaint; and that in order that these advances might be secured for the benefit of said two children, she "for the purpose and at the suggestion of her said father executed to her said father . . . the promissory note of $2,423.00 . . . and to secure its payment at the same time executed and delivered the deed of trust to Robert H. Dye, Trustee," etc.,

(3) That on 26 January, 1937, the said sum of $2,423.00 was the only amount defendant Effie S. Travis owed her father; but that it was provided in the deed of trust that it was executed for the purpose of securing the payment of the $2,423.00 note, and such other indebtedness as might be incurred by her to her father within three years from the date of said deed of trust "to be evidenced by her bonds" as shown in the admitted facts;

(4) That more than a year later, to wit, on 28 March, 1938, defendant Effie S. Travis duly received a letter from her father, N. A. Sinclair, written from the Hotel Sir Walter in the city of Raleigh, North Carolina, reading as follows:

"DEAR EFFIE:

"I have been very far from well since I wrote you last. I enclose note for you to sign and return to me at Fayetteville. Your last note was Jany 26, 1937—since then I have loaned you 14 payments of $80—which amounts to $1120—and $150 for taxes—totalling $1270—Understand that I am not charging you anything that I have sent you for yourself or the children—but only my payments on the property—and I have and do will to Ruth and Dorothy your indebtedness and notes to me, so in case I die before you do—or they do—these notes will be the property of the children and no one else will have any interest in them.

"With love to you & Dorothy

N. A. SINCLAIR

"Keep this letter carefully as it will protect the children after my death if any question should arise about my will.

DAD";

(5) That in the said letter just referred to, there was enclosed the promissory note in the sum of $1270;

(6) That at the time defendant Effie S. Travis received the said letter and the note from her father, she was under no legal obligation or liability to him to sign or deliver the note; but that "in consideration that upon the execution and delivery of said additional promissory note in the sum of $1270," it and the entire indebtedness due by her to her father evidenced by her note for $2423 should thereafter become the property of her children, Ruth Travis and Dorothy Travis, "she signed and returned to her said father for safe custody with her father for the benefit of her said children the said promissory note in the sum of $1270 . . . only upon said condition and distinct agreement with her said father, and by agreement with her said father at said time defendant retained possession of the said letter from her father . . . for the benefit and as the agent of her said children with the distinct agreement and understanding with her said father that the said letter should be construed as, and would have the effect of, a specific transfer and assignment of said two promissory notes . . . at said time to her said children . . . and that thereafter the said N. A. Sinclair would only hold possession of said two notes for the benefit of" her said children;

(7) That by reason of the agreements aforesaid between defendant Effie S. Travis and her father, her said children became, and are now, the owners in their own right of both of the said notes, and the security therefor,—whether construed in law as a gift in the lifetime of the said N. A. Sinclair to defendants, Ruth Travis and Dorothy Travis, or as a trust in said notes and property created for the benefit of said defendants by said N. A. Sinclair under the facts alleged, or by reason of other legal construction applicable to the facts alleged:

(8) That after the transactions between defendant, Effie S. Travis, and her father as alleged, and after he had become still more enfeebled by ill health and advanced age, he married the plaintiff and lived but a short time thereafter and died, leaving the last will and testament alleged in the complaint; but that at no time after he married the plaintiff was he the owner of said notes; and that plaintiff does not now own them or any interest therein.

Upon these allegations defendants pray that plaintiff take nothing by her action, and that the defendants, Ruth Travis and Dorothy Travis, be declared the owners in their own right of said notes and the deed of trust, and that plaintiff be ordered to deliver same to said defendants.

Plaintiff replying denies in material aspect all averments of the further answer and counterclaim and cross-action of defendants, in conflict with allegations of the complaint, and she admits that after the alleged

transactions between defendant, Effie S. Travis, and plaintiff's testator, he and plaintiff were married on 17 October, 1939.

Defendant, Effie S. Travis, as a witness for defendants upon the trial in Superior Court, identified the letter of 28 March, 1938, alleged to have been received by her from her father, as being in his handwriting, and same was offered in evidence,—and she testified that she signed the note enclosed in the letter. Then she was asked these questions and gave the answers indicated: "Q. Why did you sign that note, Mrs. Travis?" "A. Because of that letter." Objection—overruled—Exception. Motion to strike—denied—Exception. Exception No. 2. "Q. State whether or not you would have signed that note but for that letter?" Objection—overruled—Exception No. 4. "A. I would not." Motion to strike—denied—Exception No. 5.

The witness further continued by saying that after she signed the note, she mailed it to her father at Fayetteville; that at the time she received the letter of 28 March, 1938, the original note of $2423 had not been returned to her, and it was the only indebtedness she owed her father. And on cross-examination, the witness, looking at the two notes in question, said that no endorsements appear on the back of them.

At the close of all the evidence plaintiff moved for instructed verdict in her favor on issue as to ownership of the notes. Motion denied—Exception No. 6.

The case was submitted to the jury on these issues:

"1. Did the defendant Effie S. Travis execute and deliver to her father, N. A. Sinclair, the testator of the plaintiff, the promissory note in the sum of $1270.00 described in the pleadings in consideration of the statements contained in N. A. Sinclair's letter of March 28, 1938, as alleged in the Answer?

"2. If so, was the $2423.00 note described in the pleadings the only note and indebtedness of Mrs. Effie S. Travis to her father, N. A. Sinclair, outstanding at the time of said letter of March 28, 1938, and of the execution of said $1270.00 note?

"3. Is the plaintiff the owner and holder of the two notes described in the pleadings herein?

"4. Are the defendants Ruth Travis and Dorothy Travis the owners and holders of the two notes described in the pleadings herein?"

Plaintiff objected to the first and second issues submitted. Exception No. 8.

The jury, under peremptory instructions from the court, answered the first, second and fourth issues "Yes," and the third "No."

Judgment in accordance therewith was entered by the court.

Plaintiff appeals therefrom and assigns error.

Malone & Malone and W. D. Sabiston, Jr., for plaintiff, appellant.
Spence & Boyette for defendants, appellees.

WINBORNE, J. While there are extensive allegations of fact in support of the position taken by defendants in this action, the evidence pivots around the letter of 28 March, 1938, from N. A. Sinclair, plaintiff's deceased husband, and testator, to his daughter, the defendant Mrs. Effie S. Travis. Hence, decision on this appeal is determinable, in the main, upon proper construction as to the meaning of this letter. Defendants allege and contend that the defendants, Ruth Travis and Dorothy Travis, granddaughters of N. A. Sinclair, are the owners of the two notes on which this action is based—for that the letter created (1) a gift *inter vivos* from N. A. Sinclair to them; or (2) a trust in said notes for the benefit of them; or (3) an enforceable contract to devise said notes to them.

Plaintiff, on this appeal, challenges these contentions in this Court by assignments based on exception to denial by the trial court of her request for instructed verdict in her favor on the issue as to ownership of the notes, and on exceptions to peremptory charge of the court on which verdict was returned, and judgment entered.

The subject of gifts *inter vivos* has been under consideration, and treated by this Court, and pertinent authorities cited and assembled, in several recent decisions, among which are these: *Cartwright v. Coppersmith,* 222 N.C. 573, 24 S.E. 2d 246, and *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222; petition to rehear in the latter case being denied in written statement 226 N.C. 778, 39 S.E. 2d 599.

In the latter case, *Buffaloe v. Barnes,* preferred stock in a corporation was the subject of the alleged gift *inter vivos. Devin, J.,* writing the opinion for this Court, summarizes the law in this manner: "To constitute a gift there must be an intention to give, and the intention must be consummated by a delivery of, and loss of dominion over, the property given, on the part of the donor. *Jones v. Fullbright,* 197 N.C. 274, 148 S.E. 229; *Nannie v. Pollard,* 205 N.C. 362, 171 S.E. 341. To complete a gift *inter vivos* there must be first the intention to give and then the delivery 'as it is the inflexible rule that there can be no gift either *inter vivos* or *causa mortis* without the intention to give and the delivery.' *Newman v. Bost,* 122 N.C. 524, 29 S.E. 848; *Bynum v. Bank,* 221 N.C. 101, 19 S.E. 2d 121. 'In order to a valid gift of personal property *inter vivos* there must be an actual or constructive delivery with present intent to pass the title.' *Parker v. Mott,* 181 N.C. 435, 107 S.E. 500. Donative intent is an essential element. 24 A.J. 738, 770. To constitute delivery of shares of stock as the consummation of a valid gift *inter vivos* the donor must divest himself of all right and title to the stock and of all

dominion over it. *Phillips v. Plastridge,* 107 Vt. 267, 99 A.L.R. 1074; *Payne v. Tobacco Trading Corp.,* 179 Va. 156, 18 S.E. 2d 281; *Pomerantz v. Pomerantz,* 19 A. 2d 713 (Md.). There must be an intention to make a present gift accompanied by a delivery of the thing given or the means of obtaining it. *Payne v. Tobacco Trading Corp., supra,* and *Pomerantz v. Pomerantz, supra.* It cannot be made to take effect in the future. *Askew v. Matthews,* 175 N.C. 187, 95 S.E. 163. The transaction must show a completely executed transfer to the donee of the present right of property and possession. *Thomas v. Houston,* 181 N.C. 91, 106 S.E. 466. Doubts must be resolved against the gift. *Figuers v. Sherrell,* 178 S.W. 2d 629."

In *Cartwright v. Coppersmith, supra,* negotiable notes, such as those involved in the present action, were the subject in litigation. Mrs. Whitehurst alleged that she was the sole owner of the notes by virtue of endorsement and delivery to her by Sarah E. Elliott, the payee named therein in her lifetime. There was evidence that the notes were endorsed to Mrs. Whitehurst without recourse under signature of Sarah E. Elliott, but there was none on them after death of Sarah E. Elliott. This Court, in opinion also by *Devin, J.,* stated: "Whether the transaction which constitutes the basis of the appellant's case be regarded as the assignment of a negotiable instrument (C.S. 3010, now G.S. 25-35), or a gift *inter vivos,* in order to vest the title to the notes in Mrs. Whitehurst it must have been completed by delivery, actual or constructive, and the burden was upon her to show this . . . to show not only the endorsement of the notes by Sarah E. Elliott, but also that the intention to give or assign them to her was completed by delivery, actual or constructive." Then the opinion goes on: "It is provided by C.S. 3010 (now G.S. 25-35) that if a negotiable note is made payable to order (as were these notes) the transfer from one person to another is 'by the endorsement of the holder, and completed by delivery.' To constitute delivery there must be a parting with the possession and with power and control over it by the maker or endorser for the benefit of the payee or endorsee. To constitute delivery it must be put out of possession of the endorser. *Barnes v. Aycock,* 219 N.C. 360, 13 S.E. 2d 611. An actual delivery, however, is not essential, and a constructive delivery will be held sufficient if made with the intention of transferring the title, but there must be some unequivocal act, more than the mere expression of an intention or desire." And then the Court states this as the general rule: "'While it is not indispensable that there should have been an actual manual transfer of the instrument from the maker to the payee, yet, to constitute a delivery, it must appear that the maker in some way evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it and intentionally placing it under the power of the payee

or of some third person for his use.' " And the Court reiterates that "An intention to give is not a gift"; that "without delivery the gift is but a promise to give, and being without consideration is not obligatory, and may be revoked at will."

Applying these principles to the case in hand, the letter fails to show facts sufficient to constitute a gift *inter vivos*. The language used fails to show an intention to give, and then the delivery which are elements essential to the making of a gift *inter vivos*. Rather, the language used is more of testamentary character,—and being in the handwriting of N. A. Sinclair, nothing else appearing, it might have taken effect as a codicil to his will. But, as such, it was subject to be revoked (1) by the affirmative written declaration of N. A. Sinclair and, in his will which was probated, he did revoke all other wills and testaments theretofore made by him, and (2) by operation of law, upon the subsequent marriage of the testator, G.S. 31-6, and he subsequently married.

Now, as to the second contention, that a trust in the notes for the benefit of the granddaughters was created: "An express trust," as defined in *Wescott v. Bank,* 227 N.C. 39, 40 S.E. 2d 461, is a " 'fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it' . . . The term signifies the relationship resulting from the equitable ownership of property in one person entitling him to certain duties on the part of another person holding the legal title . . . To constitute this relationship there must be a transfer of the title by the donor or settler for the benefit of another . . . The gift must be executed rather than executory upon a contingency." See also Annotation 96 A.L.R. 383 on subject "May unconsummated intention to make a gift of personal property be made effective as a voluntary trust."

Applying these principles to the language of the letter of N. A. Sinclair, in the light of attending circumstances, the essentials of an express trust are lacking—just as are the essential elements of a gift *inter vivos*.

As to the third contention, that is, that the letter, under the attending circumstances, created an enforceable agreement by N. A. Sinclair to give the notes to his grandchildren, careful consideration of the facts of record fails to support this contention. It is contended that N. A. Sinclair, in his letter, made an offer which was accepted by Mrs. Travis, and complied with by her in signing the note of $1270 and returning same to him in conformity with his letter. In this connection, appellants challenge the competency of the testimony of Mrs. Travis to the effect that she signed the $1270 note "because of that letter," and that she would not have signed it, but for the letter. Passing but not deciding the question, the legal effect of this testimony, in the face of her written

agreement, set forth in the deed of trust which she admits she executed to R. H. Dye, Trustee, as security for the first note, fails to alter such agreement. She there agreed "that the payment as well of said indebtedness as of such other indebtedness as may be incurred by her to him (that is, to N. A. Sinclair) within three years from this date (that is, 26 January, 1937), to be evidenced by her bonds to his order with a notation thereon indicating this security . . . the entire indebtedness not exceeding the principal sum of five thousand ($5000.00) dollars, shall be secured by a conveyance of lands hereinafter described." And the letter indicates that N. A. Sinclair had loaned to her $1270 within the period stated, and it is admitted of record that the note is for that amount, and bears upon its face the notation that it is "secured by deed of trust to R. H. Dye." It would seem apparent that in signing the note Mrs. Travis was doing only what she had agreed and was obligated to do long before the letter was written. And it is generally held that "a promise to perform an act which such promisor is already bound to perform is insufficient consideration for a promise by the adverse party." 12 Am. Jur. 607, Contracts, Section 113. Thus there is here no new consideration, and no new agreement.

Hence, we hold that, on this record, defendants have failed to show ownership of the notes, and plaintiff was entitled to the instruction requested on the issue of ownership, and is entitled to judgment in accordance with this opinion.

Reversed.

CORA VEAZEY v. CITY OF DURHAM.

(Filed 3 February, 1950.)

1. Appeal and Error § 2—

An interlocutory order or judgment is not appealable unless it is a judicial decision affecting a substantial right claimed in the action or proceeding. G.S. 1-277.

2. Reference § 3—

The court has discretionary power to grant or refuse a reference in those cases coming within the compulsory reference statute, and while movant has the right to insist that the judge exercise his discretionary power and act on the motion, he has no legal right to demand that the court direct a reference. G.S. 1-189.

3. Appeal and Error § 2—

The discretionary refusal of a motion for a compulsory reference, even though the case comes within the compulsory reference statute, is not appealable.

VEAZEY *v.* DURHAM.

APPEAL by defendant from *Nimocks, J.*, at the March Term, 1949, of DURHAM.

The complaint alleges, in brief, that the defendant, a municipality, constructed and maintained its drains and sewers in such manner as to constitute a nuisance, and thereby caused substantial injury to the plaintiff's farm. It prays for damages and injunctions to abate the nuisance. The answer denies liability and pleads various defenses.

The defendant filed a motion asserting that the action was embraced within subsections 2, 3, and 5 of G.S. 1-189, and asking that the court direct a compulsory reference in it and 18 other somewhat similar cases brought against the defendant by other plaintiffs.

The court refused the reference proposed by the defendant in an order assigning these specific reasons for its action: (1) "That the ends of justice would not be promoted by the appointment of a referee, but that it is probable additional expense would be incurred and further probable delay in determining the issues of fact and questions of law involved by a reference"; and (2) "that plaintiff is entitled to a jury trial which, in the opinion of the court, will facilitate at less costs and expense to plaintiff and defendant a determination of the issues involved."

The defendant excepted to the order, and appealed. On the argument here, the plaintiff moved to dismiss the appeal on the ground that it is not authorized by law.

Victor S. Bryant and Robert I. Lipton for plaintiff, appellèe.
Claude V. Jones and Egbert L. Haywood for defendant, appellant.

ERVIN, J. The order refusing a reference shows on its face that the court denied the motion for a compulsory reference as a matter of discretion. This being so, the appeal necessarily proceeds on the assumption that the court should have granted a compulsory reference because the defendant was entitled to demand that mode of trial as a matter of right in the action at bar.

The statute which controls the granting of compulsory references is embodied in G.S. 1-189. It provides that "where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference" in certain enumerated classes or types of civil suits, among them being cases necessitating the taking of an account; cases involving a complicated question of boundary, or requiring a personal view of the premises; and cases "where the issues of fact and questions of fact arise in an action of which the courts of equity of the state had exclusive jurisdiction prior to the adoption of the constitution of one thousand eight hundred and sixty-eight, and in which the matter

or amount in dispute is not less than the sum or value of five hundred dollars."

For the purpose of this particular decision, it is taken for granted without so adjudging that the instant case falls within each of the classes or types of actions just mentioned, and that by reason thereof the court had power under the statute to refer it.

The statute stipulates that "the court may . . . direct a reference" in certain classes or types of cases. It is manifest that the verb "may" is used in this connection in its ordinary sense as implying permissive, and not mandatory, action or conduct. *Curlee v. Bank,* 187 N.C. 119, 121 S.E. 194; *Rector v. Rector,* 186 N.C. 618, 120 S.E. 195. It thus appears that the directing or refusing of a compulsory reference in an action which the court has power to refer is a matter committed by the statute to the discretion of the court.

This conclusion finds support in our decisions. *Delafield v. Construction Co.,* 118 N.C. 105, 24 S.E. 10; *Fortune v. Watkins,* 94 N.C. 304. Moreover, it harmonizes with the holdings in other jurisdictions. *Brown v. Grove,* 25 C.C.A. 644, 80 F. 564; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.,* 61 F. 546; *United States v. Groome,* 13 App. D. C. 460; *Berkowitz v. Kiener Co.,* 37 Cal. App. 2d 419, 99 P. 2d 578; *Hicks v. Atlanta Trust Co.,* 187 Ga. 623, 1 S.E. 2d 669; *Mobley v. Faulk,* 42 Ga. 314, 156 S.E. 40; *Martin v. Foley,* 82 Ga. 552, 9 S.E. 532; *Harmon v. Martin,* 395 Ill. 595, 71 N.E. 2d 74; *Brignall v. Lewe,* 383 Ill. 549, 50 N.E. 2d 577; *Washington Nat. Bank v. Myers,* 104 Kan. 526, 180 P. 268; *Day Bros. Lumber Co. v. Daniel,* 23 Ky. Law 285, 62 S.W. 866; *Guinault v. Le Carpentier,* 19 La. 239; *Pierce v. Thompson,* 23 Mass. (6 Pick.) 193; *Stockman v. Michell,* 6 Detroit Leg. N. 151, 120 Mich. 293, 79 N.W. 480; *Buchanan v. Rechner,* 333 Mo. 634, 62 S.W. 2d 1071; *Couser v. Thayer* (Mo. App.), 204 S.W. 27; *Fitzgerald v. Hayward,* 50 Mo. 516; *Brennan v. Gale,* 56 App. Div. 4, 67 N.Y.S. 382; *Loverin v. Lenox Corp.,* 35 App. Div. 263, 54 N.Y.S. 724; *Johnson v. Jones,* 39 Okl. 323, 135 P. 12, 48 L.R.A. (N.S.) 547; *Taylor v. Thompson,* 213 S.C. 104, 48 S.E. 2d 648; *Momeier v. John McAlister, Inc.,* 190 S.C. 529, 3 S.E. 2d 606; *Farley v. Matthews,* 168 S.C. 294, 167 S.E. 502; *Peeples v. South Carolina Agr. Loan Ass'n,* 156 S.C. 429, 153 S.E. 283; *Bank of Timmonsville v. Peoples' Bank,* 147 S.C. 461, 145 S.E. 288; *Peoples' Bank of Hartsville v. Helms,* 140 S.C. 107, 138 S.E. 622; *Barnwell v. Marion,* 58 S.C. 459, 36 S.E. 818; *Farmers' Mut. Ins. Ass'n v. Berry,* 53 S.C. 129, 31 S.E. 53; *Robson v. Jones,* 33 Tex. 324; *Poultry Producers' Union v. Williams,* 58 Wash. 64, 107 P. 1040, 137 Am. St. Rep. 1041; *Poler v. Mitchell,* 152 Wis. 583, 140 N.W. 330; *Hart v. Godkin,* 122 Wis. 646, 100 N.W. 1057.

This brings us to the question of the appealability of the order refusing to direct a compulsory reference. Under the statute, an interlocutory order or judgment of a Superior Court Judge is not reviewable by appeal unless it is a judicial decision affecting a substantial right claimed in the action or proceeding. G.S. 1-277.

The court had the discretionary power to direct a compulsory reference in the instant case. The appellant had the right, therefore, to insist that the judge exercise his discretion, *i.e.,* that he choose between the *granting* and the *refusing* of the reference proposed by it. But the appellant's right did not extend beyond that point. It could not demand as a legal right that the judge should do what it asked, *i.e.,* direct the reference. For this reason, the order refusing the reference does not affect a substantial right of the appellant, and is not appealable. 4 C.J.S., Appeal and Error, section 129. See, also, in this connection: McIntosh on North Carolina Practice and Procedure in Civil Cases, section 676.

The defendant cites *Royster v. Wright,* 118 N.C. 152, 24 S.E. 746, and *Jones v. Sugg,* 136 N.C. 143, 48 S.E. 575, to sustain its claim that the order in controversy is appealable. The *Royster* and *Jones cases* and the present action are quite dissimilar. In each of those cases, the lower court erroneously construed the answer of the defendant to contain a plea in bar of the action asserted by the plaintiff, and denied the motion of the plaintiff for a compulsory reference as a matter of law on the legal ground that it had no discretionary power to direct such a reference on account of the undetermined plea in bar. In the instant case, however, Judge Nimocks rightly recognized that he had authority under the law either to grant or to refuse the compulsory reference proposed by the defendant, and he denied the motion of the defendant as a matter of discretion because he concluded that the ends of justice would be best promoted by an immediate trial before a jury. Nothing in the record suggests that Judge Nimocks abused his discretion in any way.

For the reasons given, the appeal must be dismissed.

Appeal dismissed.

CORA VEAZEY v. CITY OF DURHAM.

(Filed 3 February, 1950.)

1. Judgments § 17a—

The two classes of judgments and orders of the Superior Court are: (1) Final judgments, which are those disposing of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court; and (2) interlocutory orders, which are those made during

the pendency of an action which do not dispose of the case but leave it for further action by the trial court. G.S. 1-208.

2. Appeal and Error § 2—

An appeal lies to the Supreme Court from a final judgment of the Superior Court and from an interlocutory order of the Superior Court provided such order affects some substantial right claimed by appellant and will work an injury to him if not corrected before an appeal from the final judgment. G.S. 1-277.

3. Appeal and Error § 40b—

A judgment or order rendered by the judge of the Superior Court in the exercise of a discretionary power is not subject to review in the absence of abuse of discretion.

4. Appeal and Error § 14—

An appeal from an appealable interlocutory order stays all further proceedings in the Superior Court until the matters are determined in the Supreme Court. G.S. 1-294.

5. Courts § 1—

Courts exist so that every person may have remedy by due course of law for any injury done him in his lands, goods, person, or reputation; and justice shall be "administered without sale, denial, or delay." N. C. Const., Art. I, Sec. 35.

6. Appeal and Error § 14—

The taking of an appeal from a nonappealable interlocutory order cannot deprive the Superior Court of jurisdiction to try and determine the case on its merits, since such attempted appeal is a nullity.

7. Appeal and Error § 15—

An attempted appeal from a nonappealable order confers no power on the Supreme Court to decide the appeal, and the Supreme Court must dismiss such appeal because it cannot properly exercise jurisdiction.

8. Appeal and Error § 1—

An appeal lies as a matter of right in those cases prescribed by law, G.S. 1-271, G.S. 1-277, G.S. 1-279, G.S. 1-280; but in cases where no appeal is given by law, the right of appeal does not exist, and right of appeal cannot be conferred by any action of the trial court.

9. Appeal and Error § 2—

Upon attempted appeal from a nonappealable interlocutory order, the acts of the judge of the Superior Court in setting the amount of appeal bond and settling the case on appeal do not profess to grant the right of appeal, and in no event could have this effect, since appeals lie as a matter of right and the Superior Court can neither allow nor refuse an appeal.

10. Courts § 5—

If a judge of the Superior Court enters an order without legal power to act in respect to the matter, such order is a nullity, and another Superior Court judge may disregard it without offending the rule which precludes one Superior Court judge from reviewing the decision of another.

11. Easements § 5—

Where the terms of an easement granted by deed are plain and unambiguous, its construction is for the court.

12. Same—

An easement to transport sewage in a proper manner through underground pipes does not grant the right to cast sewage into an open watercourse across the land.

13. Appeal and Error § 39b—

An answer to an issue in accordance with the rights of the parties obtaining as a matter of law, renders harmless error in submitting the question to the jury.

APPEAL by defendant from *Burney, J.,* and a jury, at the March, 1949, Term, of DURHAM.

The complaint alleges, in brief, that the plaintiff resided upon her eighty-six acre farm lying on both sides of Ellerbe Creek, a natural watercourse, in Durham County, North Carolina; that the defendant, City of Durham, a municipality, constructed and maintained its sewers in such manner as to discharge vast quantities of sewage into Ellerbe Creek; and that the defendant thereby created a nuisance and inflicted substantial and permanent injury upon the plaintiff's farm. It prays for damages, and an abatement of the nuisance. The answer denies the material allegations of the complaint, and pleads certain statutes of limitation and an easement deed from C. T. Husketh and Ada P. Husketh, the plaintiff's predecessors in title, to defendant as affirmative defenses.

The cause was calendared for trial on Monday, 14 March, 1949. During the preceding week the defendant filed a motion asserting that the action was embraced within subsections 2, 3, and 5 of G.S. 1-189, and asking Judge Q. K. Nimocks, Jr., who was then presiding in Durham Superior Court, to order a compulsory reference of the cause. The plaintiff appeared and objected to the proposed reference, insisting that the action should be tried by a jury. Judge Nimocks refused to direct a compulsory reference in an order bearing date 10 March, 1949, and reciting, in substance, that he took such action because a compulsory reference would occasion unnecessary delay and expense to the parties and because a trial before a jury in the first instance would best promote the ends of justice.

The defendant excepted to this order and gave notice in open court that it appealed therefrom to the Supreme Court. Judge Nimocks thereupon fixed the undertaking on the appeal at $75.00, and ordered that "the record proper, the notice and motion of reference, as amended, the order tendered by defendant, the order signed by the court, and the

defendant's assignments of error" should constitute "the record and case on appeal." The defendant forthwith gave an appeal bond in the sum of $75.00, and docketed certified copies of the record proper and case on appeal as settled by Judge Nimocks in the Supreme Court. The appeal pended in the Supreme Court until the Fall Term, 1949, and was then dismissed on the ground that the order of Judge Nimocks was not subject to review by appeal. *Veazey v. Durham, ante,* 354.

Meanwhile the cause was tried on its merits in the Superior Court of Durham County under the circumstances delineated below.

Durham Superior Court opened on the day the cause had been set for trial, *i.e.,* Monday, 14 March, 1949, with Judge John J. Burney presiding. When the calendar was called, the defendant moved for a continuance and objected to a trial at the existing term of court on this ground: "The Superior Court is at this time without jurisdiction to hear and try the action for the reason that the case is pending on appeal in the Supreme Court of North Carolina, and is now in the State Supreme Court." Judge Burney denied the motion for a continuance, overruled the objection to a trial at the existing term, and proceeded to try the cause on its merits before a jury. He stated in a contemporary order that he pursued this course in the exercise of his discretion because the case had been regularly calendared for trial by jury "for three weeks or more," and Judge Nimocks had denied the motion of defendant for a compulsory reference four days earlier. The defendant reserved exceptions to the rulings of Judge Burney refusing to continue the case and proceeding with its trial at the existing term.

The trial of the cause on its merits consumed six days. The parties called numerous witnesses to the stand to sustain their respective allegations. Issues were submitted to and answered by the jury as follows:

1. Is the plaintiff, Cora Veazey, the owner of the land as described in paragraph 4 of the complaint?

A. Yes (answered by the Court by consent).

2. Is the defendant, City of Durham, the owner of an easement across said lands for the purpose of owning, operating and maintaining a sewage line for the disposal of sewage and other waste waters from its disposal plant and from the City of Durham as described in the easement deed from C. T. Husketh and wife, Ada P. Husketh, to the City of Durham dated the 24th day of June, 1916, and recorded in Deed Book 50, at page 620, in the office of the Register of Deeds of Durham County?

A. Yes (answered by the Court by consent).

3. Is the defendant, City of Durham, maintaining a nuisance, as alleged in the complaint?

A. Yes.

4. If so, is the defendant, City of Durham, entitled to maintain such nuisance under the terms of the easement referred to in issue #2?

A. No.

5. Have the lands of the plaintiff been damaged by the maintenance and operation of the sewage system by the City of Durham, as alleged in the complaint?

A. Yes.

6. Is the plaintiff's cause of action barred by the statutes of limitations, as alleged in the answer?

A. No.

7. What permanent damages, if any, is the plaintiff, Cora Veazey, entitled to recover of the defendant, City of Durham?

A. $2,500.00.

Judge Burney entered judgment on the verdict adjudging that plaintiff is entitled to recover the damages assessed by the jury and the costs of the action, and commanding the defendant to take steps to abate the alleged nuisance within a reasonable time by repairing its sewer lines and by refraining from emptying raw or untreated sewage into Ellerbe Creek above the plaintiff's farms.

The defendant excepted and appealed, assigning errors.

Victor S. Bryant and Robert I. Lipton for plaintiff, appellee.

Claude V. Jones and Egbert L. Haywood for defendant, appellant.

ERVIN, J. We are confronted at the threshold of this appeal by the assertion of the defendant that Judge Burney had no power to try the cause during the week beginning on 14 March, 1949, and that in consequence the verdict and judgment must be set aside and a new trial awarded without regard to whether the trial on the merits conformed to pertinent legal principles. The defendant urges two lines of reasoning to sustain this position.

It argues initially that its appeal from the order of Judge Nimocks denying its motion for a compulsory reference transferred jurisdiction of this case from the Superior Court to the Supreme Court until such appeal was dismissed by the Supreme Court, and that by reason thereof the act of the Superior Court in trying the action on the merits while such appeal was pending constituted a complete nullity in law. This contention necessitates an examination of the principles by which decisions of the Superior Court are reviewed in the Supreme Court.

Judgments and orders of the Superior Court are divisible into these two classes: (1) Final judgments; and (2) interlocutory orders. G.S. 1-208. A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the

trial court. *Sanders v. May,* 173 N.C. 47, 91 S.E. 526; *Bunker v. Bunker,* 140 N.C. 18, 52 S.E. 237; *McLaurin v. McLaurin,* 106 N.C. 331, 10 S.E. 1056; *Flemming v. Roberts,* 84 N.C. 532. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. *Johnson v. Roberson,* 171 N.C. 194, 88 S.E. 231.

Not every judgment or order of the Superior Court is appealable to the Supreme Court. Indeed, an appeal can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal. This statute provides that "an appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial." G.S. 1-277.

The decisions construing and applying this statute and connected provisions of the Code of Civil Procedure implementing it establish the propositions set forth below:

1. An appeal lies to the Supreme Court from a final judgment of the Superior Court. *Johnson v. Insurance Co.,* 219 N.C. 445, 14 S.E. 2d 405; *Grocery Co. v. Newman,* 184 N.C. 370, 114 S.E. 535; *Yates v. Insurance Co.,* 176 N.C. 401, 97 S.E. 209; *Martin v. Flippin,* 101 N.C. 452, 8 S.E. 345; *Moore v. Hinnant,* 87 N.C. 505.

2. An appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court, unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment. *Parrish v. R. R.,* 221 N.C. 292, 20 S.E. 2d 299; *Cole v. Trust Co.,* 221 N.C. 249, 20 S.E. 2d 54; *Hosiery Mill v. Hosiery Mills,* 198 N.C. 596, 152 S.E. 794; *Leak v. Covington,* 95 N.C. 193; *Welch v. Kinsland,* 93 N.C. 281.

3. A nonappealable interlocutory order of the Superior Court, which involves the merits and necessarily affects the judgment, is reviewable in the Supreme Court on appropriate exception upon an appeal from the final judgment in the cause. G.S. 1-278; *Alexander v. Alexander,* 120 N.C. 472, 27 S.E. 121. An earlier appeal from such an interlocutory order is fragmentary and premature, and will be dismissed. *Cement Co. v. Phillips,* 182 N.C. 437, 109 S.E. 257.

4. A judgment or order rendered by a judge of the Superior Court in the exercise of a discretionary power is not subject to review by appeal to the Supreme Court in any event, unless there has been an abuse of discretion on his part. McIntosh: North Carolina Practice and Procedure

in Civil Cases, section 676; *Beck v. Bottling Co.,* 216 N.C. 579, 5 S.E. 2d 855; *Smith v. Insurance Co.,* 208 N.C. 99, 179 S.E. 457; *Winslow Co. v. Cutler,* 205 N.C. 206, 170 S.E. 636.

When a litigant takes an appeal to the Supreme Court from an appealable interlocutory order of the Superior Court and perfects such appeal in conformity to law, the appeal operates as a stay of all proceedings in the Superior Court relating to the issues included therein until the matters are determined in the Supreme Court. G.S. 1-294; *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496; *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617; *Ragan v. Ragan,* 214 N.C. 36, 197 S.E. 554; *Vaughan v. Vaughan,* 211 N.C. 354, 190 S.E. 492; *Bohannon v. Trust Co.,* 198 N.C. 702, 153 S.E. 263; *Likas v. Lackey,* 186 N.C. 398, 119 S.E. 763; *Pruett v. Power Co.,* 167 N.C. 598, 83 S.E. 830; *Combes v. Adams,* 150 N.C. 64, 63 S.E. 186.

But this sound principle is not controlling upon the record in the case at bar. The defendant took its appeal from an order of Judge Nimocks denying its motion for a compulsory reference. Since Judge Nimocks entered such order in the exercise of a discretion reposed in him by law, and since nothing suggested or indicated any abuse of such discretion on his part, the order was not subject to review by appeal. *Veazey v. Durham, supra.* For this reason, we are presently concerned with this precise question: What is the effect of an appeal from a nonappealable interlocutory order upon proceedings in the Superior Court pending the dismissal of the appeal by the Supreme Court?

Back of every legal principle lies the reason that gave it birth. Hence, a rule of law can be best interpreted and applied if due heed is paid to the reason which called it into being. Let us consider the reason which accounts for the rules regulating appeals.

Courts exist so that every person may have remedy by due course of law for any injury done him in his lands, goods, person, or reputation. N. C. Const., Art. I, Sec. 35.

Although the law's delay has been a chronic lament among men for centuries, the law itself does not will that justice should be lame. In truth, its consciousness that justice delayed is justice denied arose before this guaranty of *Magna Carta* was exacted from King John at Runnimede: "To no one will we deny justice, to no one will we delay it." The awareness of the law in this respect finds present-day expression in the declaration of our organic law that right and justice shall be "administered without sale, denial, or delay." N. C. Const., Art. I, Sec. 35.

There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are

designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, *i.e.*, to administer "right and justice . . . without sale, denial, or delay." N. C. Const., Art. I, Sec. 35.

This being true, a litigant cannot deprive the Superior Court of jurisdiction to try and determine a case on its merits by taking an appeal to the Supreme Court from a nonappealable interlocutory order of the Superior Court. A contrary decision would necessarily require an acceptance of the paradoxical paralogism that a party to an action can paralyze the administration of justice in the Superior Court by the simple expedient of doing what the law does not allow him to do, *i.e.*, taking an appeal from an order which is not appealable.

Our conclusion on this aspect of the controversy finds full sanction in previous decisions of this Court adjudging that when an appeal is taken to the Supreme Court from an interlocutory order of the Superior Court which is not subject to appeal, the Superior Court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the Supreme Court. *S. v. Lea,* 203 N.C. 316, 166 S.E. 292; *Goodman v. Goodman,* 201 N.C. 794, 161 S.E. 688; *Dunn v. Marks,* 141 N.C. 232, 53 S.E. 845; *S. v. Dewey,* 139 N.C. 556, 51 S.E. 937; *Guilford County v. Georgia Co.,* 109 N.C. 310, 13 S.E. 861; *Carleton v. Byers,* 71 N.C. 331. Moreover, this conclusion is sustained by the repeated cases holding by implication rather than by express declaration that an appeal to the Supreme Court from a nonappealable order of the Superior Court confers no power on the Supreme Court to decide the appeal, and that the Supreme Court must dismiss the appeal because it cannot properly exercise a jurisdiction which it does not possess. *Hawley v. Powell,* 222 N.C. 713, 24 S.E. 2d 523; *Wadesboro v. Coxe,* 216 N.C. 545, 5 S.E. 2d 716; *Spruill v. Bank,* 163 N.C. 43, 79 S.E. 262; *Benton v. Collins,* 121 N.C. 66, 28 S.E. 59.

The defendant maintains secondarily on the present phase of the litigation that the trial before Judge Burney was invalid even if its appeal from the order of Judge Nimocks was insufficient of itself to oust the jurisdiction of the Superior Court. To support its position in this respect, the defendant advances this argument: That the defendant gave notice in open court of its appeal from the order of Judge Nimocks denying its motion for a compulsory reference at the time of the entry of the order; that Judge Nimocks immediately fixed the amount of the appeal bond and settled the case on the defendant's appeal; that such action on the part of Judge Nimocks was tantamount to his granting the defendant the right to appeal from the order refusing the motion for a compulsory reference; that if Judge Nimocks erred in allowing the defendant the right to appeal from such order, his action constituted

a mere erroneous decision, which was correctable only by the Supreme Court upon an appropriate appeal; that when Judge Burney caused the case to be tried on its merits before a jury while this defendant's appeal was pending undetermined in the Supreme Court, he necessarily reviewed and reversed the decision of Judge Nimocks granting the defendant the right to such appeal; that in so doing, Judge Burney violated the rule that "one Superior Court judge has no power to review the findings, orders, and decrees of another Superior Court judge." *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407; and that in consequence the trial before Judge Burney and the jury was a void proceeding.

This position is untenable. The argument underlying it is based upon a misconception of the nature of the appellate process as it obtains in this jurisdiction, and upon a misunderstanding of the scope of the act of Judge Nimocks in settling the case on appeal and fixing the appeal bond.

Appeals lie from the Superior Court to the Supreme Court as a matter of right rather than as a matter of grace. Under the Code of Civil Procedure, the aggrieved party is authorized to *take an appeal* in the cases prescribed by law. G.S. 1-271, 1-277, 1-279, 1-280. In such cases, he appeals as a matter of right on compliance with the statutes and rules of court as to the time and manner of taking and perfecting the appeal. *Goodman v. Call,* 185 N.C. 607, 116 S.E. 724; *Lindsey v. Knights of Honor,* 172 N.C. 818, 90 S.E. 1013; *Caudle v. Morris,* 158 N.C. 594, 74 S.E. 98. But in cases where no appeal is given by law, the right of appeal does not exist, and cannot be exercised. *In re Stiers,* 204 N.C. 48, 167 S.E. 382. These things being true, a Superior Court judge can neither allow nor refuse an appeal. For this reason, this Court has rightly declared that "the Judge below has nothing to do with the granting of an appeal; it is the act of the appellant alone." *Campbell v. Allison,* 63 N.C. 568; *Wilson v. Seagle,* 84 N.C. 110. The Superior Court judge is simply empowered to perform certain acts, *e.g.,* setting the amount of the appeal bond and settling the case on appeal, necessary to the perfecting of an appeal taken by an appellant in a case where the right of appeal is given by law.

When he signed the order fixing the amount of the appeal bond and settling the case on appeal, Judge Nimocks did not profess to grant to the defendant any right to appeal. He merely undertook to implement the appeal which the defendant had attempted to take. The ultimate legal result, however, would have been the same in any event. An appeal did not lie from the discretionary ruling denying the motion for a compulsory reference, and in consequence the attempted appeal of the defendant was simply a nullity. *Centennial Mill Co. v. Martinov,* 83 Utah 391, 28 P. 2d 391; *Deere & Webber Co. v. Hinckley,* 20 S.D. 359, 106 N.W.

138. Judge Nimocks could not breathe the breath of life into the nostrils of this legal corpse. *Riddle v. Hudgins,* 7 C.C.A. 335, 58 F. 490. If he had undertaken to confer upon the defendant a right of appeal which was denied to it by the law, his action would have been void, and Judge Burney could have disregarded it without offending the rule which precludes one Superior Court judge from reviewing the decision of another Superior Court judge upon the ground that the decision is erroneous. That rule does not apply if the first Superior Court judge had no legal power to act with respect to the matter covered by his decision. *Collins v. Wooten,* 212 N.C. 359, 193 S.E. 835. A court may always treat a void order as a nullity. *Ferrell v. Hales,* 119 N.C. 199, 25 S.E. 821.

The case at bar is substantially on "all fours" with *S. v. Dewey, supra,* where the accused took an appeal at the April, 1905, Term, of the Superior Court of Craven County from a discretionary order of Judge James L. Webb denying his motion for a bill of particulars, and was tried over his protest before Judge Erastus B. Jones and a jury at the July, 1905, Term of the Superior Court of Craven County, notwithstanding that his appeal from Judge Webb's order was still pending. The original transcript of the record in the *Dewey case* discloses that Judge Webb, like Judge Nimocks in the instant case, signed an order fixing the appeal bond and settling the case on appeal. The fact that the *Dewey case* was a criminal action does not prevent it from being decisive on this appeal for the statute provides that appeals in criminal cases "shall be perfected . . . as provided in civil actions." G.S. 15-180.

This brings us to a consideration of the remaining assignments of error of the defendant. They assert, in appropriate legal phraseology, that Judge Burney erred in admitting and rejecting testimony; in refusing to dismiss the action upon a compulsory nonsuit; in submitting certain issues drafted by him, and in declining to submit other issues tendered by defendant; in refusing to give to the jury instructions requested by the defendant; in charging the jury; in refusing to vacate the verdict and award a new trial; and in rendering the judgment which appears in the record. A painstaking study of these assignments of error and of the transcript of the record leaves us with the abiding conviction that nothing occurred on the trial prejudicial to the substantial rights of the defendant. For this reason, the trial and the ensuing judgment must be upheld.

We think it proper to say that Judge Burney committed an error favorable to the defendant when he left it to the jury to determine the legal effect of the easement deed executed by C. T. Husketh and Ada P. Husketh, the plaintiff's predecessors in title. This deed was written in plain terms, and its construction was a matter for the court. *King v. Davis,* 190 N.C. 737, 130 S.E. 707. The instrument empowered the

defendant to transport sewage "in a proper manner" through a narrow strip of plaintiff's eighty-six acre farm by means of pipes "beneath the surface of the earth." Manifestly, it did not bar an action predicated upon the allegation that the defendant had damaged the plaintiff's farm by casting sewage into an open watercourse which traversed the farm, and Judge Burney ought to have so ruled as a matter of law. The negative answer of the jury to the fourth issue, however, rendered this particular error harmless to plaintiff. *Nichols v. Trust Co., ante,* 158, 56 S.E. 2d 429.

Counsel for both parties have presented their respective views on the questions arising on this appeal with unusual ability, industry, and zeal, and we deem it not amiss to state that their excellent briefs have been highly helpful.

We close this opinion with an admonition given by this Court to the trial bench three-quarters of a century ago: "But certainly when an appeal is taken as in this case from an interlocutory order from which no appeal is allowed by The Code, which is not upon any matter of law and which affects no substantial right of the parties, it is the duty of the Judge to proceed as if no such appeal had been taken." *Carleton v. Byers, supra.* It is at least as important now, as it was in the days of *Magna Carta,* that justice should be administered without delay.

No error.

JOCIE MOTOR LINES, INC., v. BRUCE JOHNSON, INDIVIDUALLY, AND BRUCE JOHNSON, TRADING AS BRUCE JOHNSON TRUCKING COMPANY.

(Filed 3 February, 1950.)

1. Judgments § 34—Federal judgment bars action in State Court as to all matters which were or should have been adjudicated in the Federal Court.

In an action in the Federal Court, recovery was obtained for damages resulting from the collision of an automobile and a truck operated in interstate commerce under a lease by one defendant from the other defendant, the judgment therein holding the defendants to be jointly and severally liable to the plaintiffs in that action. *Held:* The judgment was tantamount to holding defendants to be joint tort-feasors as a matter of law and, under the Federal practice, the lessee had the right to set up therein any indemnity agreement of lessor, Federal Rule of Civil Procedure No. 14, 28 U.S.C.A. 723c, and therefore the Federal judgment bars a subsequent suit in the State Court by lessee against lessor to recover upon the indemnity agreement and precludes lessee from asserting that its liability was secondary.

2. Carriers § 5—

Where the holder of a franchise from the Interstate Commerce Commission for the transportation of goods in interstate commerce leases trucks from one not authorized to transport goods in interstate commerce and operates such trucks under its own franchise and license plates, such holder may not escape liability to the public for the negligent operation of such trucks.

3. Constitutional Law § 28—

The decisions of our Federal Courts must be accorded the same faith and credit by us that we are required to give to the judicial proceedings of another state.

APPEAL by the defendant from *Armstrong, J.*, at June Term, 1949, of MECKLENBURG.

The facts pertinent to this appeal are as follows:

1. The plaintiff herein entered into a lease agreement on or about 1 October, 1942, under the terms of which it leased certain vehicles from the defendant herein, for use in interstate commerce. The leased vehicles were to have assigned and affixed to them, for the duration of the lease, the lessee's Interstate Commerce identification plates. And the lessee agreed to cover the leased vehicles with public liability insurance.

2. The lessee agreed to pay the lessor 80 per cent of the gross receipts free from all sales taxes or freight tax.

3. The lessor was to furnish and pay the drivers of the leased vehicles. But all freight hauled in interstate commerce, pursuant to the agreement, was to be hauled on standard bills of lading in the name of Jocie Motor Lines, Inc. All return loads had to be specified or solicited by the lessee.

4. The lessor agreed to indemnify and save harmless the lessee against any claim arising from the operation of the leased vehicles and against any claim for loss or damage to any shipment or shipments being transported in said vehicles.

5. On 29 March, 1943, while the lease agreement was in force, one of the leased vehicles left Charlotte, N. C., loaded with a cargo to be delivered to Swift & Co., in Roanoke, Va. The cargo was delivered and on the return trip to Charlotte the vehicle, while being driven by the lessor's driver, Clifton Gilmore, collided with the automobile of one Hubert D. Hodges, near Rocky Mount, Va., resulting in the death of one of the occupants of the automobile and seriously injuring three others.

6. As a result of the above collision, four actions were instituted against the defendant lessor, in the Circuit Court of Franklin County, State of Virginia. The cases were removed to the District Court of the United States for the Western District of Virginia, Roanoke Division.

7. Thereafter the defendant lessor moved to make the plaintiff herein a third party defendant in those actions. The motion was granted and Jocie Motor Lines, Inc., filed answers and denied liability.

8. The cases were consolidated for trial and judgments aggregating $9,500.00 were rendered in favor of the plaintiffs. Both the plaintiff and the defendant herein were held to be jointly and severally liable for the injuries sustained by the plaintiffs.

9. The American Fidelity & Casualty Company, the public liability carrier of the plaintiff herein, paid one-half of the total amount of the above judgments, in the amount of $4,750.00, on 16 December, 1943, and assigned its purported claim, by way of subrogation against the defendant herein, to its insured, the plaintiff herein on 1 December, 1946.

10. The plaintiff instituted this action to recover under its assignment of the above claim and its contract of indemnity, and insists that in any event its liability was only secondary and that it is now entitled to have these questions adjudicated.

11. The defendant filed a demurrer to the complaint as amended by the amendment and reply, in which he demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action against the defendant, in that it appears:

(a) That the plaintiff and defendant herein have been adjudged as jointly and severally liable for the negligence of the driver of the leased vehicle, and that a joint and several judgment, in the aggregate amount of $9,500.00 was duly entered in the United States District Court for the Western District of Virginia, Roanoke Division, in an action entitled "Annie Catherine Hodges, *et als.* plaintiffs *v.* Bruce Johnson, trading as Bruce Johnson Trucking Company, and Clifton Gilmore, defendants, and Jocie Motor Lines, Inc., Third Party defendant."

(b) That in the reply filed by the plaintiff in this action it is admitted that the plaintiff had procured a casualty insurance policy issued by the American Fidelity & Casualty Company, under the terms of which said insurance company became obligated to pay, and did pay, the amounts set forth in paragraph 4 of the complaint; and it is further admitted that the plaintiff, Jocie Motor Lines, Inc., did not make any payments upon the judgments referred to in the complaint, and that it did not pay any of the expenses, court costs or attorneys' fees sought to be recovered in this action.

(c) That the purported claim of the plaintiff by reason of the assignment from the American Fidelity & Casualty Company arises out of or results from the amounts paid on the judgments referred to in subparagraph (a) hereof.

(d) The American Fidelity & Casualty Company has never at any time had, did not on the 1st day of December, 1946, have, and does not now have, any valid claim against this defendant.

(e) That the amount sought to be recovered by the plaintiff is not a claim for loss sustained by the plaintiff for or against which the defendant agreed to indemnify and save harmless the plaintiff under the lease agreement.

The demurrer was overruled, and defendant appeals and assigns error.

Smathers, Smathers & Carpenter and Smathers & Meekins for plaintiff.

Helms & Mulliss for defendant.

DENNY, J. We think the questions sought to be litigated in this action were or might have been adjudicated in the case of *Hodges, et als. v. Johnson, et als.*, 52 F. Supp. 488. The plaintiff herein was made a third party defendant in that action, under the Federal Rules of Civil Procedure, Rule 14, 28 U.S.C.A., Sec. 723c, governing third party practice. The rule permits a defendant "to bring in a third party, provided the third party is liable to the defendant by way of contribution, indemnity, or otherwise, for the claim made against him." 35 C.J.S., p. 993, where the reason for this rule is also stated, as follows: "Rule 14 was formulated and adopted, in keeping with the purpose of all the Federal Rules of Civil Procedure, to simplify and expedite procedure, the purpose of such rule being to accomplish in one proceeding the adjudication of the rights of all persons concerned in the controversy, to prevent the necessity of trying several related claims in different lawsuits and to enable all of them to be disposed of in one action, or, as otherwise expressed, the purpose or object of such rule is to avoid circuity of action and multiplicity of suits and to adjust in a single suit the several phases of the same controversy as it affects the parties. The remedy provided by this rule must be exercised promptly. The rule should be liberally construed to effectuate its intended purposes, to the end that circuity of action may be avoided and that disputed jural relationships growing out of the same matter be resolved in one action, and should be applied whenever the application of such rule will simplify procedure, secure a speedy trial, terminate the litigation, and reduce costs."

It was further provided in Rule 12 (a), 28 U.S.C.A. 723c, which Rule was in effect in 1943, that: "A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of

third parties of whom the court cannot acquire jurisdiction." And in 13(g) of the same Rule, that: "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

It seems to us that the Federal Rules of Civil Procedure, as set forth above, were devised to cover just such a factual situation as that presented on this appeal. Under the express provisions of these Rules, it was contemplated that all questions which might arise between the defendant and a third party defendant, by way of contribution, indemnity or otherwise, growing out of a pending action, should be adjudicated in one action.

In the case of *Hancock Oil Co. v. Universal Oil Products Co.,* 115 F. 2d 45 (Ninth Circuit), it was held that where a counterclaim arises out of the "transaction or occurrence that is the subject matter of the opposing party's claim," the counterclaim is compulsory and unless stated in the answer the right to recover thereon is lost.

Furthermore, prior to the amendment of Rule 14, which became effective 19 March, 1948, the rule provided: "The third party defendant is bound by the adjudication of the third party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third party plaintiff."

The question of primary and secondary liability could have been raised in the former litigation, just as it was in the case of *War Emergency Co-Op. Assn. v. Widenhouse,* 169 F. 2d 403 (Fourth Circuit), where the facts were essentially on all-fours with those before the Court in *Hodges et als. v. Johnson, et als., supra.*

In the last cited case, *Judge Barksdale* held, as a conclusion of law, that "Johnson was an independent contractor, and upon the familiar general rule of *respondeat superior,* there would be no liability upon Jocie for the negligence of Gilmore." . . . He then said: "However, inasmuch as it appears to me that the situation here presents an exception to the general rule that an employer of an independent contractor is not liable for bodily harm caused by such independent contractor or his servants, I conclude that Jocie is jointly and severally liable with Johnson for the negligence of Johnson's servant, Gilmore. The exception to which I refer is stated in the 'Restatement of the Law of Torts,' p. 1149, Sec. 428, as follows: 'An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to

others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.' "

Therefore, it is quite clear that the parties hereto are not only bound by the judgment entered in *Hodges, et als. v. Johnson, et als., supra,* as to the questions raised and determined therein, but the judgment is *res judicata* on the issues that could have been raised and adjudicated therein. *Angel v. Bullington,* 33 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832; *Distributing Co. v. Carraway,* 196 N.C. 58, 144 S.E. 535; *Moore v. Harkins,* 179 N.C. 167, 101 S.E. 564; *Griffin v. Griffin,* 183 Va. 443, 32 S.E. 2d 700; *Brunner v. Cook,* 134 Va. 266, 114 S.E. 650.

Moreover, in the case of *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71, where Brown, the owner of a truck, leased it to a franchise carrier, we held that the relationship of employer and employee existed between Brown, the lessor, who was also the driver of the truck, and the lessee, the owner of the franchise. The defendant, lessee, contended Brown was an independent contractor and besides he had agreed to indemnify and save harmless the lessee against any claim arising from the operation of the leased vehicle. The agreement to indemnify was in the identical language as that contained in the lease now under consideration. *Devin, J.,* in speaking for the Court, said: "The provision in the contract in the case at bar whereby the lessor Brown agreed to indemnify and save harmless the lessee from any claim arising from the operation of the vehicle may not be held to relieve the defendant, if as a matter of law under the facts found liability under the Workmen's Compensation Act accrued, as provided by the statute. G.S. 97-6. The act of the defendant in accord with the provisions of the lease in placing its own license plates on Brown's truck under the circumstances disclosed, thus giving it the status and holding it out as its own vehicle for the purpose of this trip, a procedure which alone authorized its operation, must be regarded as an assumption of such control as would defeat the plea of non-liability for injury to the driver on the ground of independent contractor."

The holder of a franchise from the Interstate Commerce Commission, for the transportation of goods in interstate commerce, cannot escape liability to the public for the negligent operation of trucks leased from one not authorized to transport goods in interstate commerce, and operated under its own franchise and license plates for the transportation of goods in interstate commerce. *Brown v. Truck Lines, supra; Wood v. Miller,* 226 N.C. 567, 39 S.E. 2d 608; *Hodges et als. v. Johnson et als., supra; Steffens v. Continental Freight Forwarders Co.,* 66 Ohio App. 534; *Kimble v. Wilson,* 352 Pa. 275; Restatement of the Law of Torts, Section 428.

The plaintiff and the defendant herein were parties to the action in *Hodges, et als. v. Johnson, et als., supra,* and the judgment therein holding them to be jointly and severally liable to the plaintiffs in that action, was tantamount to holding them to be joint tort-feasors as a matter of law, and no appeal having been taken therefrom, *Angel v. Bullington, supra,* the plaintiff is not entitled to re-litigate matters which were or might have been adjudicated in that action.

The decisions of our Federal Courts must be accorded the same faith and credit by us that we are required to give to the judicial proceedings of another State. *Knights of Pythias v. Meyer,* 264 U.S. 30, 68 L. Ed. 885; *Hancock Nat. Bank v. Farnum,* 176 U.S. 640, 44 L. Ed. 619; *Lewis v. Furr,* 228 N.C. 89, 44 S.E. 2d 604; *Suskin v. Hodges,* 216 N.C. 333, 4 S.E. 2d 891; G.S. 8-4.

The demurrer interposed below should have been sustained, accordingly the judgment overruling the demurrer is

Reversed.

GAITHER N. BOBBITT v. JUNIUS L. HAYNES, JR., JUNIUS L. HAYNES, SR., AND HAYNES MOTOR COMPANY.

(Filed 3 February, 1950.)

1. Automobiles § 12a—

The statutory speed limit of 55 miles per hour on a highway does not relieve the driver of a vehicle from the duty of not exceeding a speed which is reasonable and prudent under the conditions existent or the duty to decrease speed when approaching an intersection or when hazards exist with respect to pedestrians, traffic or weather conditions, or the duty to observe special limitations on speed duly promulgated by the State Highway Commission or local authorities when appropriate signs giving notice thereof are duly erected. G.S. 20-141 (a) (b) (c) (d) (f).

2. Same—

Even in the absence of statutory requirements, the operator of a motor vehicle is under duty to exercise ordinary prudence, to keep the vehicle under control and to keep a reasonably careful lookout so as to avoid colliding with persons and vehicles whose presence can be reasonably anticipated.

3. Automobiles § 8i—

G.S. 20-156 (a) providing that the driver of a vehicle entering a public highway from a private road shall yield the right of way to vehicles approaching on such highway does not apply to a motorist entering such highway from a public street.

4. Same—

The failure to observe a stop sign duly erected by the State Highway Commission before entering an intersection with a dominant highway is not negligence *per se* but is merely to be considered with other evidence in the case upon the question. G.S. 20-158.

5. Same

A person entering upon an intersection with a State highway has the right to assume that a motorist traveling upon such highway will observe special speed restrictions lawfully promulgated by the State Highway Commission or local authorities of which notice is given by duly erected signs upon the highway.

6. Automobiles § 8a—

The operator of a motor vehicle is not under duty to anticipate negligence on the part of others but may assume that other operators will use reasonable care and caution commensurate with visible conditions, and that they will approach with their vehicles under reasonable control, and that they will observe and obey the rules of the road.

7. Automobiles § 18h (3)—Evidence held insufficient to show contributory negligence as a matter of law on part of motorist entering intersection with State highway.

The evidence tended to show that plaintiff, traveling on a dirt road, approached an intersection with a State highway, and stopped before entering upon the intersection, that the intersection was within the corporate limits of a municipality, that defendant, traveling along the highway and approaching from plaintiff's right, passed a corporate limits sign stating a speed limit of 25 miles per hour, entered the intersection at 55 miles per hour, and struck plaintiff's car just as its front wheels had cleared the hard surface. The evidence was conflicting as to whether plaintiff undertook to cross the highway after seeing defendant's car approaching or whether plaintiff first saw defendant's car when in the act of crossing the intersection. *Held:* Nonsuit on the ground of contributory negligence was properly denied.

APPEAL by defendant Junius L. Haynes, Jr., from *Harris, J.*, at September Civil Term, 1949, of DURHAM.

Civil action for recovery of damages to plaintiff's automobile allegedly resulting from actionable negligence of defendant Junius L. Haynes, Jr.

Motions for judgment as of nonsuit entered by all defendants at close of plaintiff's evidence having been allowed as to all except Junius L. Haynes, Jr., and he alone having appealed, the case is stated only as it relates to him—as the defendant.

The action grows out of a collision of automobiles at the intersection of U. S. Highway No. 70 and Liberty Street inside, and near the eastern corporate limits of the city of Durham. It occurred about 4:30 o'clock p.m. on 24 September, 1947. Plaintiff's automobile, operated by him,

was traveling east on Liberty Street, and the automobile operated by defendant was traveling north on U. S. Highway No. 70.

Plaintiff alleges in his complaint, summarily stated, that the collision was proximately caused by the negligence of defendant in that he was operating his automobile "at a high, dangerous and unlawful rate of speed, to wit, in excess of 55 miles per hour," and without keeping a proper lookout, or giving warning of his approach, or due regard to the traffic then on the highway, "in violation of Chapter 20 of the General Statutes of North Carolina, 1943, and amendments thereto."

Defendant, answering, denies that he was negligent in any respect alleged in the complaint, and for further answer and defense avers: That at the time and upon the occasion complained of the plaintiff was entering Highway No. 70 from Liberty Street; that there is a "Stop" sign on Liberty Street warning vehicles entering said highway from said street to come to a full stop before doing so; that plaintiff failed and neglected to stop at said "Stop" sign, and negligently, carelessly and recklessly dashed out into Highway No. 70 in front of the automobile being operated by defendant, and that such negligence on the part of plaintiff contributed to and was the proximate cause of the injuries complained of, and such contributory negligence is pleaded in bar of any recovery in this action.

And the evidence offered by plaintiff, on the trial in Superior Court, tends to show this factual situation at the scene, and time of the collision: U. S. Highway No. 70, running from Raleigh to Durham, intersects Liberty Street about 165 to 170 feet inside the corporate limits of the city of Durham. The highway runs in a general northerly-southerly direction, and Liberty Street approximately east-west. The highway is 28 feet, maybe 22 feet wide, and is paved,—"a good two-lane traffic." Liberty Street is not paved, but is of dirt surface. Approaching the intersection from south, the direction of Raleigh, the highway is downgrade, and from the west Liberty Street is on a slight incline. The street is more level than the highway. On the east side of the highway there is a "City Limits" sign, with the word "Durham" on it, underneath which are these words and figures, "Speed Limit 25 MPH." On the south side of Liberty Street there is a "Stop" sign approximately 48 feet from the west edge of the highway. The top of the hill on the highway south is about 300 or 400 feet from the intersection or place of collision. A police officer testified that standing on the west edge of the highway at the place of collision, he could first see the bumper of a car coming from Raleigh about 300 feet away; that the top of the hill would be 300 or 400 feet from the place of collision; that he saw no obstruction there that would keep plaintiff from seeing to the top of the hill after he stopped at the "Stop" sign on Liberty Street at the edge of the highway, and that

likewise defendant could see in the direction he was going, that is, that plaintiff and defendant could see each other.

Plaintiff, as witness for himself, testified: That about 4:30 o'clock on the afternoon alleged he stopped at the "Stop" sign on Liberty Street before undertaking to cross Highway No. 70; "that at the time he stopped he was five or six feet from the edge of the paved highway; that he saw an automobile coming from the north or from the direction of Durham, traveling toward Raleigh; that he let that car go past; that as it went by, he looked and saw another automobile coming from Raleigh; that 'I started then on over and after I had got on the concrete I seen an automobile coming from the direction of Raleigh'; that when he saw it, it was somewhere near the City sign, right close to it; that he was familiar with the sign and knew it was a city limits sign and under it was a speed limit sign indicating that the speed within the city limits was 25 miles per hour; that his car was in low gear; . . . that at the time of the impact his front wheels had gone off the hard surface and onto the dirt"; that after the collision his car was on the east side of the highway; and that he heard defendant tell one of the officers "that he was making 55." And on cross-examination plaintiff further testified substantially in repetition of what he had said on direct examination, and . . . that there was nothing to keep him from seeing to the top of the hill in the direction of Raleigh; that he looked in that direction before crossing the highway and could see to the top of the hill; and that when he saw defendant's automobile it was 50 or 75 steps away,—"after he had done got up on the highway."

The police officer, as witness for plaintiff, further testified that he talked to both the plaintiff and the defendant in the presence of each other, and that defendant said that at the time of the collision he was going about 55 miles an hour; and that plaintiff said he was going around ten miles an hour and looked up and saw a car coming at a high rate of speed about the city limits sign, and he speeded up, and might have picked up two or three miles faster before the impact; that he was in low gear. And the officer further testified that marks on plaintiff's car indicated it had been hit on the right side, and the marks on the road, sideways, showed that plaintiff's front wheels were about six inches beyond the edge of the highway at the time of the impact; that the car traveling north, after the impact, was turned around, and that it had been raining and the highway was wet.

Plaintiff also alleged in his complaint that a part of U. S. Highway No. 70 immediately east of the corporate limits of the city of Durham, as well as inside of said corporate limits, ran and runs through a very densely populated section and was constantly used by vehicles and pedestrians both day and night, which was known to defendant, or could have

been known to him in the exercise of ordinary care, and defendant admits the paragraph of the complaint in which the above allegation is made, and the admission is in evidence.

Defendant introduced no evidence.

Motion of defendant for judgment as in case of nonsuit at the close of all the evidence was denied. Defendant excepted.

The case was submitted to the jury on issues as to (1) negligence of defendant, (2) contributory negligence of plaintiff, and (3) damages. The jury, in verdict rendered, answered the first issue "Yes," the second "No," and the third "$900.00."

Defendant appeals to Supreme Court and assigns error.

R. M. Gantt for plaintiff, appellee.

Fuller, Reade, Umstead & Fuller for defendant, appellant.

WINBORNE, J. The sole question presented for consideration on this appeal is predicated upon assignments of error based on exceptions to the refusal of the court below to allow defendant's motion for judgment as of nonsuit first entered at the close of plaintiff's evidence, and renewed at the close of all the evidence in the case.

It is the contention of defendant that the evidence introduced by plaintiff, and shown in the record, taken in the light most favorable to him, and giving to him the benefit of every reasonable intendment and inference to be drawn therefrom, shows him to be guilty of contributory negligence as a matter of law,—and, hence, that judgment as of nonsuit on this ground should have been granted. However, when tested by pertinent statutes of this State, and decisions of this Court, the evidence is not so clear in meaning as to warrant such holding.

In this connection it is appropriate to consider the legal rights of the respective parties at the time of and under the circumstances of the collision. It is noted that while there is allegation in the complaint that U. S. Highway No. 70, immediately east of, as well as within the corporate limits, "runs through a very thickly populated section," it is not alleged that the approach to the scene of the collision along the highway from the east was in a "business district" as defined in Motor Vehicle Act, G.S. 20-38 (a), or in a "residential district" as defined in Section G.S. 20-38 (w) 1 of said act. Thus the speed restrictions prescribed by statute, G.S. 20-141, as rewritten in Part IV, Section 17 of Chapter 1067 of 1947 Session Laws of North Carolina, effective from and after 1 July, 1947, prior to the date of the collision in question, are pertinent to be considered in judging the conduct of plaintiff. It is provided that "(a) no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing"; and that

"(b) except as otherwise provided in this chapter, it shall be unlawful to operate a vehicle in excess of" a speed of fifty-five miles per hour in places other than those in business and residential districts, for passenger cars, etc.

And it is provided in subsection (c) that the fact that the speed of a vehicle is lower than the foregoing limit shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty to use due care.

Moreover, it is provided in subsection (d) of this statute that whenever the State Highway and Public Works Commission shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth be greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said commission shall determine and declare a reasonable and safe speed limit thereof, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway. And in subsection (f) the local authorities within their respective jurisdictions are given like powers.

Furthermore, it is a general rule of law, even in the absence of statutory requirements, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinary prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highways. This duty requires that the operator be reasonably vigilant, and that he must anticipate and expect the presence of others. And, as between operators so using the highway, the duty of care is mutual, and each may assume that others on the highway will comply with this obligation. 5 Am. Jur. Automobiles, Sections 165, 166, 167. *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Reeves v. Staley*, 220 N.C. 573, 18 S.E. 2d 239; *Tarrant v. Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565.

And it is not contended on this appeal that there is insufficient evidence to support a finding by the jury that defendant was negligent in the manner alleged.

Now, as to the alleged contributory negligence of plaintiff: While it is averred in the answer that there was a "Stop" sign on Liberty Street warning vehicles entering Highway No. 70 from Liberty Street to come to a full stop before doing so, there is neither allegation nor proof that

such sign was so placed by, or with the sanction of local authorities. Who then had the right of way?

The statute G.S. 20-155 (a) provides that "when two vehicles approach or enter an intersection . . . at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right, except as otherwise provided in G.S. 20-156." And G.S. 20-156 (a) provides that "the driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public highway." Hence, as the plaintiff in the present case was traveling on a public street, the provisions of G.S. 20-156 (a) are inapplicable. (Compare *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337.) And the evidence most favorable to plaintiff tends to show that his automobile was in the intersection when defendant's automobile was 50 to 75 steps away. So, if the highway and the street were of equal dignity, the provisions of G.S. 20-155 (a) would not apply as the two automobiles were not approaching or entering the intersection at the same time.

On the other hand, it is provided by statute, G.S. 20-158 (a), that "the state highway and public works commission, with reference to state highways, and local authorities, with reference to highways under their jurisdiction, are authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stops before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto." And this statute further provides that "no failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence." See *Reeves v. Staley, supra.*

In the light of the provisions of this statute, G.S. 20-158 (a), if the evidence offered as to the city limits sign, with speed limit on it, on the highway, and the "Stop" sign on Liberty Street be sufficient to justify the inference that they were erected with legal authority within the purview of this statute so as to designate U. S. Highway No. 70 as the main or through highway, or to limit the speed of motor vehicles traveling on the highway approaching the intersection in question, all the evidence tends to show that plaintiff brought his automobile to a full stop before entering or attempting to cross said highway. And in entering and attempting to cross, he had the right to take into consideration the speed limit shown on the city limits sign. For "one is not under a duty of anticipating negligence on the part of others, but in the absence of any-

thing which gives or should give notice to the contrary, a person is entitled to assume, and to act upon the assumption, that others will exercise ordinary care for their own safety." 45 C.J. 705, *Shirley v. Ayers,* 201 N.C. 51, 158 S.E. 840. See also *Murray v. R. R., supra; Reeves v. Staley, supra; Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211; *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246.

Indeed, the operator of a motor vehicle on a public highway may assume that other operators of motor vehicles will use reasonable care and caution commensurate with visible conditions, and that they will approach with their vehicles under reasonable control, and that they will observe and obey the rules of the road. See *Hobbs v. Coach Co., supra; Shirley v. Ayers, supra,* and *Murray v. R. R., supra,* where the authorities are cited.

But if plaintiff had not so stopped, his failure so to do would not have been contributory negligence *per se* in this action at law for injury to property. The facts relating to such failure to stop, might under the express provisions of the statute, be considered with other facts in the case in determining whether plaintiff was guilty of contributory negligence.

Thus, plaintiff is entitled to have his conduct, in entering and undertaking to cross the highway, under the circumstances the evidence tends to show, judged in the light of the provisions of the above statutes and principles declared and applied in decisions of this Court, in determining whether he acted as a reasonably prudent man would have so acted under the same or similar circumstances, that is, with ordinary care.

And the evidence is not clear as to whether plaintiff saw defendant's automobile coming, and then undertook to cross the highway, or whether plaintiff started across, and, when in the act of crossing, saw defendant's automobile. And the evidence is not clear as to whether in law the highway and the street were roads of equal dignity; or whether the highway was in law the dominant road.

In this case the facts as to these matters are determinable by the jury under appropriate instructions from the court as to the law involved.

In the judgment below, we find

No error.

STATE OF NORTH CAROLINA ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. R. H. JARRELL, CLAIMANT, EMPLOYEE, ET ALS., AND PEE DEE MANUFACTURING COMPANY.

(Filed 3 February, 1950.)

1. Master and Servant § 62—

The findings of fact of the Employment Security Commission are conclusive when supported by evidence, and therefore review is limited to determining whether there was evidence before the Commission to support its findings and whether the facts found sustain its conclusions of law.

2. Master and Servant § 61—

Where the employer resists recovery of unemployment compensation on the ground that claimants' unemployment was due to a work stoppage resulting from a labor dispute, each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under G.S. 96-14 (d).

3. Master and Servant §§ 60, 61—After strike, notice of suspension of operations and that employees might seek other employment, held not discharge.

A finding that, after a strike which closed the plant and after the employer's attempt to resume operations had proved futile, the employer posted a notice stating that all operations at the mill would cease for an indefinite period and that employees were free to seek employment elsewhere, *is held* insufficient to support a conclusion of law by the Commission that subsequent to the posting of the notice the unemployment of claimants was not due to stoppage of work because of a labor dispute, G.S. 96-14 (d), since the notice merely signified the willingness of the employer to terminate its employment relationship with any worker who elected to withdraw from the existing labor dispute and seek work elsewhere, but did not alter the status of any employee who refrained from exercising this option.

APPEAL by Pee Dee Manufacturing Company from *Bobbitt, J.*, at March Term, 1949, of RICHMOND.

This proceeding is based upon claims filed under the Employment Security Law, *i.e.*, Chapter 96 of the General Statutes as amended, by 55 workers for unemployment benefits for varying periods beginning 31 July, 5 August, 7 August, and 7 September, 1947, caused by a stoppage of work which occurred at a cotton mill at Rockingham, North Carolina, owned by the Pee Dee Manufacturing Company, and known as Pee Dee Mill No. 2. The Pee Dee Manufacturing Company, which is hereafter called the Company, actively opposed the claims. It asserted that the claimants were disqualified by G.S. 96-14 (d) for the benefits sought by them on the ground that their unemployment during the periods covered

by their claims was due to a stoppage of work which existed because of a labor dispute at Pee Dee Mill No. 2.

The testimony relating to the claims was taken before a special claims deputy, who referred the evidence and all questions of fact and law arising thereon to the Employment Security Commission for determination pursuant to the authority vested in him by G.S. 96-15 (b).

All parties conceded the truth of the matters set out in this paragraph. The Company is a corporation, whose capital stock was owned by Clairmont and Golding down to 1 September, 1947. It employed about 230 persons at its Pee Dee Mill No. 2. On 2 June, 1947, the Company and a labor union representing a majority of the employees found themselves unable to agree upon a contract covering work in the plant; and the members of the union thereupon walked out, established picket lines, and thereby induced a total shutdown of the plant for the purpose of coercing acceptance by the Company of terms proposed by the union. On 30 June, 1947, the Company undertook to reopen the plant. It persisted in this effort for a week, and then gave over because a sufficient operating force would not cross the picket lines. On 7 July, 1947, the Company posted this notice on its bulletin board: "Notice to all employees. Pee Dee Mill No. 2 will cease all operations effective as of this date for an indefinite period. All employees are free to seek employment elsewhere." The Company utilized sometime next succeeding the posting of the notice in renovating the machinery in the mill. On 1 September, 1947, Golding sold his capital stock in the Company to Carella and Guorgopoulous, and on 1 October, 1947, Clairmont made a similar transfer to the same parties. On the day last mentioned, Pee Dee Mill No. 2 resumed normal operations.

The Company presented evidence before the special claims deputy tending to show that in June, 1947, its employees were divided into two groups, to wit, a small minority, who desired to work, and a large majority, who were resolved to shut down Pee Dee Mill No. 2 until the Company agreed to a contract embodying the union demands; that the unsuccessful efforts of the Company to resume operations at the plant during the week beginning 30 June, 1947, precipitated much violence between the two groups of employees, and convinced the Company that it was not possible to reopen the mill as long as the majority of the employees were determined to strike and to prevent the minority from working; that in consequence of its determination in this respect the Company posted the notice of 7 July, 1947, on its bulletin board merely to manifest its acceptance of the forced shut down of Pee Dee Mill No. 2 as an accomplished fact, and to apprise all concerned that it did not intend to promote further antagonism between the two groups of its employees by attempting to resume operations at the plant against the

active opposition of the majority group; that the Company did not intend the notice of 7 July, 1947, to put an end to its relations with its employees, and the notice was not construed by either the Union or the employees to have any such purpose or effect; that, on the contrary, the Union remained unwilling "for the mill to run without a contract" after 7 July, 1947, and notified the Company after that date "that people would not be allowed by the Union to go into the mill and work"; that the majority group kept pickets stationed at or near the mill gates at times after 7 July, and on occasions subsequent to that date they prevented mechanics from entering the plant to renovate the machinery; that "the Company was able and ready and willing to run and engage in production at any time after July 7 that it could have got people in to work," but it "never had any communication . . . that the Union was ready and willing to let the people in to work"; that on or about 1 October, 1947, a majority of the employees notified the Company for the first time that they were willing to return to work; that thereupon the Company resumed normal operations at Pee Dee Mill No. 2; and that the strike was then "called off and ended."

When it made its findings of fact on the evidence taken before the special claims deputy, the Employment Security Commission took no account whatever of the testimony presented by the Company and summarized in the preceding paragraph. It made findings of fact, however, conforming with exactitude to the admitted matters set out in the fourth paragraph of this statement. The only finding relating in any way to events occurring at Pee Dee Mill No. 2 after 7 July, 1947, was this: "5. That thereafter the plant remained closed until October 1, 1947, at which time it reopened and resumed operations for all intents and purposes."

On the basis of its findings of fact, the Commission concluded as a matter of law that the notice of 7 July, 1947, totally separated the employees at Pee Dee Mill No. 2 from their employment by the Company and "that the unemployment of employees of the plant subsequent to that date was not caused by a stoppage of work attributable to a labor dispute, but was caused by the total separation of such employees from employment by the employer." The Commission thereupon adjudged that the 55 claimants "are entitled to benefits without disqualification, if otherwise eligible, on and after July 31, August 5, August 7, and September 1, 1947, according to the date of claims filed."

The Company excepted to the judgment of the Commission and appealed to the Superior Court of Richmond County, assigning error in law. When the appeal was heard in the Superior Court, a judgment of affirmance was entered, and the Company appealed to this Court, assigning error in law.

W. D. Holoman, R. B. Overton, R. B. Billings, and D. G. Ball for the Employment Security Commission of North Carolina, appellee.

Pierce & Blakeney for Pee Dee Manufacturing Company, appellant.

ERVIN, J. Under the statute providing for judicial review of the decisions of the Employment Security Commission, the findings of fact of the Commission are binding upon the reviewing court if supported by evidence, and the judicial review is limited to determining whether errors of law have been committed by the Commission. G.S. 96-15 (i); *Unemployment Compensation Comm. v. Harvey & Son Co.*, 227 N.C. 291, 42 S.E. 2d 86; *In re Steelman*, 219 N.C. 306, 13 S.E. 2d 544, 135 A.L.R. 929. For this reason, the function of the reviewing court is ordinarily twofold: (1) To determine whether there was evidence before the Commission to support its findings of fact; and (2) to decide whether the facts found sustain the conclusions of law and the resultant decision of the Commission. *Unemployment Compensation Comm. v. Harvey & Son Co., supra.*

The appellant has not preserved any exceptions to any of the findings of fact of the Commission. *Russos v. Bailey*, 228 N.C. 783, 47 S.E. 2d 22; *Smith v. Davis*, 228 N.C. 172, 45 S.E. 2d 51, 174 A.L.R. 643; *Rader v. Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609. Hence, we are spared the task of determining whether the testimony before the Commission supported the facts found by it.

The appellant's exception raises this question: Do the facts found by the Commission sustain the judgment of the Superior Court? Since this judgment merely affirmed the decision of the Commission, recourse must be had to that decision and to the legal premise on which it rests for the solution of our problem.

The issue before the Commission was whether the claimants were barred from recovery of the benefits claimed by them by this provision of the statute: "An individual shall be disqualified for benefits . . . for any week with respect to which the Commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the Commission that (1) he is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and (2) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute." G.S. 96-14 (d).

Each of the claimants was required to show to the satisfaction of the Commission that he was not disqualified for benefits under the Employment Security Law by this statute. *In re Steelman, supra.* This being so, the decision of the Commission constituted an adjudication that the 55 claimants were not disqualified for benefits under G.S. 96-14 (d). As the claimants did not base their claims on the proviso in the statute, this adjudication was necessarily bottomed upon the conclusion of law that the unemployment of the claimants during the periods covered by their claims was not due to a stoppage of work which existed because of a labor dispute at Pee Dee Mill No. 2. This brings us to the final question as to whether this conclusion of law is sustained by the only finding of fact invoked for that purpose, *i.e.,* the finding that on 7 July, 1947, the Company posted this notice on its bulletin board: "Notice to all employees. Pee Dee Mill No. 2 will cease all operations effective as of this date for an indefinite period. All employees are free to seek employment elsewhere."

The Commission advances a line of reasoning to establish the connection between this finding of fact and the conclusion of law necessarily underlying the decision of the Commission and the judgment of the Superior Court affirming it. It concedes that all unemployment of workers at Pee Dee Mill No. 2 between 2 June, 1947, and the moment of the posting of the notice of 7 July, 1947, was occasioned solely by a strike arising out of the inability of the Company and the Union representing a majority of its employees to agree on a contract covering work in the mill. It asserts, however, that the notice of 7 July, 1947, constituted in law a discharge by the Company of all of its employees, and that by reason thereof any subsequent unemployment of the claimants was occasioned by their discharge and not by a stoppage of work which existed because of a labor dispute at Pee Dee Mill No. 2. The Commission insists that this conclusion is valid regardless of what events may have occurred at the plant subsequent to the posting of the notice and regardless of what parts the claimants may have played in such events.

This reasoning ignores both the plain wording of the notice, and the realities of the situation as depicted by the other findings of the Commission. When the notice was posted, Pee Dee Mill No. 2 was completely closed by a strike which had been in progress for more than a month. Efforts to resume operations had proved futile. There was no prospect that the plant could be reopened by the Company at any time within the foreseeable future. By posting the notice, the Company merely accepted the shut-down of the mill as an accomplished fact, and signified its willingness to terminate its employment relationship with any worker who elected to withdraw from the existing labor dispute and to seek work elsewhere. The notice did not alter the status of any employee who

refrained from exercising this option. It certainly did not cause the unemployment of those who were already on strike and who continued on strike until the existing labor dispute ended.

None of the findings of fact indicate that any of the claimants elected to withdraw from the labor dispute and to seek work elsewhere.

It follows that the facts found by the Employment Security Commission do not support the conclusion of law and the resultant decision of the Commission, or the judgment of the Superior Court affirming such decision. The judgment of the Superior Court is, therefore,

Reversed.

H. L. PERKINS, J. W. PERKINS AND N. C. NEWMAN, PARTNERS, v. B. L. LANGDON.

(Filed 3 February, 1950.)

1. Partnership § 1a: Landlord and Tenant § 1—

The fact that lessor is to receive as rent a percentage of the proceeds or net profits of the business, does not constitute lessor a partner therein. G.S. 42-1.

2. Landlord and Tenant § 3—

In the absence of a stipulation or covenant to the contrary, a landlord has a right to sell leased premises.

3. Landlord and Tenant § 16½—

Lessees' allegations to the effect that lessor had sold the leased premises during the existence of their three year term, and that they had been damaged as a result of such sale, standing alone, are insufficient to state a cause of action. The rights of the respective parties upon the landlord's sale of the reversion discussed by MR. JUSTICE DENNY.

4. Pleadings § 23—

Where the Supreme Court sustains demurrer *ore tenus* upon appeal, plaintiffs may apply for leave to amend their pleadings. G.S. 1-131.

APPEAL by defendant from *Patton, Special Judge,* at May Term, 1949, of ALAMANCE.

Civil action to recover damages for alleged breach of contract for the use and occupancy of two tobacco warehouses in the City of Fayetteville, N. C.

The plaintiffs allege, among other things:

1. That the negotiations between the plaintiffs and the defendant culminated in a contract on or about 15 July, 1947, under the terms of which the defendant agreed to lease his two tobacco sales warehouses,

known as Lafayette and Cape Fear warehouses, to the plaintiffs for the three leaf tobacco market seasons of 1947, 1948 and 1949. That the other essential terms of said contract and agreement were and are as follows: That the plaintiffs were to have possession of the said warehouses for each of the leaf market seasons of 1947, 1948 and 1949, not less than two weeks before the border leaf market officially opened in each of said years and were to surrender possession at the expiration of one week after the Fayetteville leaf market was officially closed for each of said seasons; the defendant contracted and agreed to furnish warehouse tobacco trucks, tobacco baskets and scales, which equipment was to be inventoried at the beginning of each marketing season at the prevailing market price and, in the event of the loss or destruction of any such equipment, the lessees, at the end of the tobacco market season, would pay the defendant the inventory price of such lost or destroyed equipment; that the plaintiffs would pay as rental for the use of said warehouses and equipment 30% of the plaintiffs' gross commissions on all tobacco sold except tobacco sold directly or indirectly by the plaintiffs as operators, which sales are known in the trade as "house sales," together with 30% of all amounts collected by the plaintiffs as tobacco basket rentals; that the plaintiffs would pay the expense of all scale adjustments required during the tobacco market seasons and to pay all warehouse operating expenses; that the percentage of gross commissions to be paid to the defendant was to be credited or posted in favor of the defendant at the close of each sale and remittance to be made by the plaintiffs weekly through each marketing season.

2. That after making and entering into the aforesaid contract and agreement the plaintiffs and the defendant agreed that a memorial of said contract should be put in writing and executed by the parties. A written memorial of said agreement was prepared by the defendant's attorney and delivered to the plaintiffs on or about 15 July, 1947, for execution by the plaintiffs and defendant. That, upon receipt of said written memorial, the plaintiffs presented it to the defendant for his signature, whereupon the defendant announced that notwithstanding that the said memorial was drawn in accord with the agreement between the parties and correctly embodied the agreement, he would nevertheless refuse to sign it because he had decided that he wanted to insert in the agreement a provision permitting him to cancel the entire agreement in the event of a sale by him of said warehouses. That the plaintiffs protested and insisted that the defendant should abide by his contract and reminded the defendant that they had incurred great expense in preparation for the operation of said warehouses for a period of three years and that the defendant had known during all of the negotiations that the plaintiffs would not enter into a contract of lease of said warehouses for

a shorter period than three tobacco market selling seasons. That, notwithstanding the plaintiffs' objections and protests, the defendant, without denying the terms of the contract which he had made and entered into with the plaintiffs, as hereinbefore alleged, refused to execute the written memorial. That, pursuant to the terms of the contract and agreement between the plaintiffs and defendant, the plaintiffs entered into possession of the said warehouses and operated the same throughout the tobacco market season of 1947. That, as the result of the efforts and long experience of the plaintiffs, the operation of said warehouses for the 1947 market season was successful and the plaintiffs paid to the defendant the sum of $22,401.25, representing 30% of the plaintiffs' gross commissions in the sale of tobacco and the rental of tobacco baskets and in addition thereto paid the defendant the sum of $374.00 for the loss in inventory of equipment furnished by the defendant. That the said amounts of money were paid to the defendant in compliance with the terms and provisions of the plaintiffs' contract with the defendant and all of said payments were accepted by the defendant without objection or protest.

3. That on or about 25 January, 1948, the defendant advised the plaintiffs that he had sold the warehouses which he had theretofore leased to the plaintiffs for the tobacco market seasons of 1947, 1948 and 1949. The defendant has wrongfully breached said contract entered into with the plaintiffs and by selling said warehouses has deprived the plaintiffs of the use and occupancy thereof for the remaining term of said contract to the great damage of the plaintiffs as herein alleged.

From a verdict and judgment in favor of the plaintiffs, the defendant appeals and assigns error.

Brooks, McLendon, Brim & Holderness and James R. Nance for plaintiffs.

Robert H. Dye and Cooper, Sanders & Holt for defendant.

DENNY, J. The defendant demurred *ore tenus* to the complaint in this Court, on the ground that it does not state a cause of action against the defendant. A careful consideration of all the allegations contained in the plaintiffs' complaint and the amendments thereto, leads us to the conclusion that the demurrer should be sustained.

After interposition of the demurrer, counsel for plaintiffs argued that the terms of the lease were such as to constitute a joint enterprise, and therefore the lessor and the lessees were operating the warehouses as partners. We do not concur in this view. The provisions of G.S. 42-1 are controlling on this point, which statute reads as follows: "No lessor of property, merely by reason that he is to receive as rent or compensation

for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee." *S. v. Keith,* 126 N.C. 1114, 36 S.E. 120; *Lawrence v. Weeks,* 107 N.C. 119, 12 S.E. 120; *Day v. Stevens,* 88 N.C. 83.

The gravamen of plaintiffs' cause of action is the sale of the leased warehouses before the expiration of the lease. But the weakness of the plaintiffs' position lies in the fact that the lease contains no stipulation against a sale of the leased properties during its existence. It is quite clear, from an examination of the pleadings, that the plaintiffs do not allege that the defendant made any promise to them not to sell the warehouses during the existence of the lease. The only controversy between them on this point, was whether or not the lease was to be canceled if the lessor should sell the leased properties before the expiration of the lease.

"The owner of leased property may sell it during the continuance of the lease, and the lessee cannot prevent the landlord from selling the premises, subject to the lease, in the absence of covenants, or resist a change of landlords." 51 C.J.S., p. 895, 35 C.J. 1213.

It is also said in 32 Am. Jur. 99: "A landlord may transfer his reversion, or any part thereof, . . . his right to make such transfer is incident to his right of property and necessary to the full enjoyment of it. It is generally held that in the absence of a stipulation to that effect in the lease, a voluntary transfer of the reversion by the landlord neither terminates the leasehold estate nor deprives the tenant of any of his rights under the lease. . . . On the other hand, there is authority to the effect that where the lessor transfers the reversion to an innocent purchaser for value who had no notice of the tenancy, and nothing sufficient to put him upon inquiry existed at the time of the sale, the transfer destroys the leasehold, is a wrong to the lessee, and renders the lessor liable to the lessee in an action at law for damages."

Likewise, Tiffany Real Property, Third Edition, Vol. 1, Chap. 5, Section 110, has this to say about the transfer of reversion: "The lessor's reversion, or estate in reversion, may be transferred by the lessor to another, and by the latter again transferred, and so again by the last transferee, and each transferee becomes the landlord for the time during which he holds title to the reversion. The ordinary mode in which such a transfer, with its consequent change of landlords, occurs, is by voluntary conveyance by the lessor, or by his transferee, of his estate in the land. The conveyance need not refer in terms to the lease, a conveyance of the premises by the landlord being necessarily subject to the rights of the tenant, and consequently being of a reversionary interest only, provided the grantee, or a purchaser for value, has notice, actual or constructive, of the lease. Such notice the grantee may have from the tenant's posses-

sion of the premises or from the record of the lease, if the lease is within the recording laws, as leases, except for brief periods, usually are. In case the lease is within the recording laws, and is not recorded, and the grantee, being a purchaser for value, has no notice thereof otherwise, he will take free from any rights in the tenant under the lease. If, on the other hand, the lease is not within the recording laws, the grantee, although a purchaser for value, and without notice thereof, will, it seems, take subject thereto."

The right of a landlord to sell leased premises, in the absence of a stipulation or covenant not to do so, is supported by the overwhelming weight of authority. Thompson on Real Property (Permanent Edition), Vol. 3, Chap. 23, Sec. 1380; *Grover v. Norton,* 183 N.Y.S. 731; *Friedlander v. Rider,* 30 Neb. 783, 47 N.W. 83; *Peterman v. Kingsley,* 140 Wisc. 666, 123 N.W. 137; *Kilmer v. White,* 254 N.Y. 64, 171 N.E. 908; *In re O'Donnell,* 240 N.Y. 99, 147 N.E. 541; *Hughes v. Donlon,* 149 Tenn. 506, 261 S.W. 960, 35 A.L.R. 506; *Wilson v. Beck* (Texas Civil Appeals), 286 S.W. 315; *Garetson v. Hester,* 57 Cal. App. 2d 39, 133 Pac. 2d 863.

Moreover, rents due under a lease follows the reversion. G.S. 42-2; *Kornegay v. Collier,* 65 N.C. 69; *Bullard v. Johnson,* 65 N.C. 436; *Holly v. Holly,* 94 N.C. 670.

It does not appear from the plaintiffs' pleadings whether the plaintiffs were in the actual possession of the premises in question at the time the defendant sold the warehouses, or whether the possession had been released to the defendant for the interim period between seasons. Furthermore, the pleadings are silent as to whether the purchasers of the leased premises knew of the existence of the outstanding lease at the time they purchased the properties, or whether they were innocent purchasers for value and had no notice of the tenancy and nothing sufficient to put them on inquiry existed at the time of the transaction. Neither is it alleged that plaintiffs made any demand on the new owners of the property for the possession of the leased premises during the 1948 marketing season, in accordance with the terms of their lease or that such possession was refused. What the facts are in this respect, will no doubt have a material bearing on the future course of this litigation.

But when the allegations of the plaintiffs' pleadings are considered in light of the authorities cited herein, we hold that where tenants merely allege that their landlord has sold the leased premises during the existence of their lease, and that they have been damaged as a result of such sale, such allegations, standing alone, do not state a cause of action.

The demurrer *ore tenus* is sustained, the judgment below is set aside and the cause remanded to the Superior Court of Alamance County, where the plaintiffs may have leave to amend their pleadings as provided

by statute, if so advised. G.S. 1-131; *Watson v. Lee County,* 224 N.C. 508, 31 S.E. 2d 535.

Demurrer to complaint sustained.

IN THE MATTER OF NOLLIE NEILL AND NANCY NEILL, MINORS, BY THEIR GUARDIAN, J. B. NEILL, v. ELIZABETH E. BACH.

(Filed 3 February, 1950.)

1. Judgments § 30—

In an action to construe a will, adjudication that the renunciation of the life estate by the life tenant accelerated the vesting of the remainder is *res judicata*, and precludes a defendant in an action to compel acceptance of deed from the remaindermen from contending that the remainder had not vested.

2. Wills §§ 33k, 34c—Acceleration of remainder to a class does not change date of calling of roll to determine members of the class.

The will devised a life estate to testatrix' daughter for life, remainder to her children. The life tenant renounced her life estate and it was adjudicated that the renunciation of the life estate accelerated the vesting of title in members of the class *in esse* at that time. *Held:* The acceleration of the estate of the remaindermen does not change the date when the final roll call will be made to ascertain members of the class, and although members of the class *in esse* are not required to account for rents and profits pending the birth of other members of the class, after-born children must be let in, and the fee simple title to the land cannot be conveyed prior to the death of the life tenant except for reinvestment pursuant to judicial decree. G.S. 41-11.

APPEAL by defendant from *Pless, J.,* at November Term, 1949, of RUTHERFORD.

This is a controversy without action submitted under G.S. 1-250, upon an agreed statement of facts, the pertinent parts of which are as follows:

1. E. N. Washburn, a resident of Rutherford County, North Carolina, died in March, 1935, leaving a holographic will in which he devised all his property, both real and personal, to his wife, Grace H. Washburn, her lifetime. He made no disposition of the remainder.

2. E. N. Washburn left an estate of considerable value, and was survived by his widow, Grace H. Washburn, and eight children, all of whom were over 21 years of age at the time of his death.

3. Grace H. Washburn, widow of E. N. Washburn, and life tenant under his will, died in March, 1944, leaving a last will and testament. She was also survived by all eight of her children.

4. Lillian W. Neill is a daughter of the said E. N. Washburn and Grace H. Washburn, and is the wife of J. B. Neill; and J. B. Neill is the duly appointed, qualified and acting guardian for Nollie Neill, now about 17 years of age, and Nancy Neill, now about 11 years of age, and these two minors are the only children of the said J. B. Neill and Lillian W. Neill.

5. In Item Three of the will of Grace H. Washburn, she made the following devise: "I give, bequeath and devise the house and lot situated on West Main Street in Forest City, North Carolina, to my daughter, Lillian Washburn Neill, for the period of her natural life, with the remainder in fee to her children, with the provision that she shall not mortgage or encumber this property during her life. . . . My said daughter is to accept this home in lieu of any further interest in the estate of my husband, E. N. Washburn, or my estate, since this would be equal to her pro rata part of the estate, and I wish to have a home provided for her."

6. Subsequent to the death of Grace H. Washburn and during the administration of her estate, Lillian W. Neill refused to accept the life estate in the house and lot on West Main Street in Forest City, North Carolina, devised to her under Item Three of the will of Grace H. Washburn, and elected to take in lieu thereof one-eighth interest in the estate of her father, E. N. Washburn, deceased.

7. Thereafter, in 1945, an action was brought by the heirs at law of E. N. Washburn, under the Declaratory Judgment Act, for a construction of the will wherein Lillian W. Neill and her husband, J. B. Neill, and their two children were defendants. All other interested parties were parties plaintiff. The court held that Lillian W. Neill had the right to elect to take her one-eighth interest in her father's estate in lieu of the devise in her mother's will; and having rejected the life estate devised to her in the house and lot in Forest City, North Carolina, by the will of her mother, the life estate was terminated and Nollie Neill and Nancy Neill, minors, became the owners in fee simple of the said house and lot.

8. On or about 1 September, 1949, J. B. Neill, as guardian for Nollie Neill and Nancy Neill, minors, contracted, subject to the approval of the court, to sell to Elizabeth E. Bach, the house and lot devised to said minors by Grace H. Washburn, their grandmother, for the sum of $15,000.00 in cash, and the court approved the sale, and appointed J. B. Neill as guardian and commissioner to convey the property to the purchaser.

9. The defendant concedes the regularity of the proceeding, and that the said guardian and commissioner has tendered deed in proper form; but she declined to accept the deed, contending it does not convey the property in fee simple, for the reason that there is a possibility that other

children may be born to Lillian W. Neill, in which event they would have an interest in the property under the provisions of the will of Grace H. Washburn.

The court below held that the deed tendered by the plaintiffs to the defendant is sufficient in form and conveys a good fee simple title to the lands described therein, and directed the defendant to comply with the terms of her contract.

The defendant appeals, assigning error.

J. S. Dockery for plaintiffs.

Jones & Davis for defendant.

DENNY, J. The appellant concedes that the principle of the acceleration of vested remainders has been recognized in this jurisdiction in several cases where the widow rejected the life estate devised to her with remainder to certain named beneficiaries. *Cheshire v. Drewry,* 213 N.C. 450, 197 S.E. 1; *Young v. Harris,* 176 N.C. 631, 97 S.E. 609; *Baptist Female University v. Borden,* 132 N.C. 476, 44 S.E. 47; *Wilson v. Stafford,* 60 N.C. 646.

However, it is contended by appellant in her brief, that an estate in remainder should not be accelerated when the renunciation results in a substantial diminution of the remaining assets of an estate, as it manifestly did in this case; but that the life estate should be "sequestered to compensate those beneficiaries under the will whose shares are cut down by her election." Simes, Future Interests, Vol. III, Sec. 761; 33 Am. Jur., p. 623.

While it does not appear from the record before us whether or not the above contention was raised in the action instituted in 1945, in which the court construed the will of Grace H. Washburn, and held that the estate of the remaindermen was accelerated by the renunciation of the life estate devised to Lillian W. Neill, that was certainly the proper action in which to raise it. Consequently, the ruling of the court in that case on the question of acceleration is *res judicata.*

The sole question presented for decision on this appeal is whether or not, upon the rejection and renunciation of the life estate by Lillian W. Neill in the house and lot devised to her under Item Three of the will of Grace H. Washburn, the fee simple title to the property vested immediately in the remaindermen, who were *in esse* at that time, to the exclusion of any other members of the class of remaindermen who might be born thereafter.

We said in *Cheshire v. Drewry, supra:* "This doctrine of acceleration rests upon the theory that the enjoyment of the expectant estate is postponed for the benefit of the preceding vested estate or interest, and upon

the destruction of the preceding estate or interest before it regularly expired the ultimate taker came into the present enjoyment of the property. When a widow declines, by filing a dissent thereto, to take under the will, the decisions hold that the rights and interests of the parties must be considered and determined as if she had died." This is in accord with what was said in each of the above cited cases on the question of acceleration. However, it will be noted that in none of those cases was the remainder devised to a class whose membership was not ascertainable at the time of the acceleration of the remainder. Here the devise is to Lillian W. Neill "for the period of her natural life, with remainder in fee to her children." And as further evidence of the intent not to close the class before the death of her daughter, she stated her purpose in creating the life estate was to provide a home for her daughter. And while this intention to provide a home for her daughter for life did not affect the acceleration of the rmainder when Lillian W. Neill renounced the life estate devised to her, it does indicate an intent to give the remainder to her children as a class at the death of the life tenant. And in such cases, the weight of the authority, according to Simes, Future Interests, Vol. I, Sec. 61, and Vol. II, Sec. 379, is to the effect that children of a class born after the renunciation of a life estate and the acceleration of the remainder, will be let in during the life of the life tenant. Therefore, as held in the action instituted in 1945, to construe the will of Grace H. Washburn, the renunciation of the life estate accelerated the estate of the remaindermen and those members of the class *in esse* at that time, were entitled to the immediate possession of the devised premises. And such members are not required to account for rents and profits pending the birth of other members of the class. *Cole v. Cole,* 229 N.C. 757, 51 S.E. 2d 491. Even so, the class may not be closed until the possibility of afterborn children is extinct by the death of Lillian W. Neill. *Cole v. Cole, supra.*

Ordinarily all the members of a class can be ascertained at the time a particular estate teminates. *Bell v. Gillam,* 200 N.C. 411, 157 S.E. 60; *Trust Co. v. Stevenson,* 196 N.C. 29, 114 S.E. 370; *Lumber Co. v. Herrington,* 183 N.C. 85, 110 S.E. 656; *Cooley v. Lee,* 170 N.C. 18, 86 S.E. 720. But here the limitation over is to the children of Lillian W. Neill. The full roll of those who may come within the class cannot be ascertained prior to her death. Usually the termination of the prior estate and the death of the first taker coincide. Here, however, the life tenant has rejected her devise. In so doing she did not change the date when the final roll call will be made to ascertain the members of the class. This view is supported by the fact that if she had accepted the devise of the life estate, she and the guardian of her children could not convey an indefeasible fee simple title to the property, thereby cutting off the interest of unborn members of the class. *Thompson v. Humphrey,* 179

N.C. 44, 101 S.E. 738; *Deem v. Miller,* 303 Ill. 240, 135 N.E. 396, 25 A.L.R. 766. However, such title could be given pursuant to a judicial decree for reinvestment in which the interest of unborn members of the class would be protected. *DeLaney v. Clark,* 196 N.C. 282, 145 S.E. 398; *Lumber Co. v. Herrington, supra; Poole v. Thompson,* 183 N.C. 588, 112 S.E. 323; *McLean v. Caldwell,* 178 N.C. 424, 100 S.E. 888; *Dawson v. Wood,* 177 N.C. 158, 98 S.E. 459; *Pendleton v. Williams,* 175 N.C. 248, 95 S.E. 500; *Springs v. Scott,* 132 N.C. 548, 44 S.E. 116. But the guardian of the minor plaintiffs herein is not seeking a sale of the premises involved for reinvestment, as provided in G.S. 41-11, as amended by Chap. 811 of the 1949 Session Laws of North Carolina. However, such method of procedure is open to the parties if they choose to avail themselves of it.

For the reasons herein stated, the judgment below is

Reversed.

IN THE MATTER OF THE RECEIVERSHIP OF PORT PUBLISHING COMPANY.

CLAIM OF PETITIONERS UNDER CONTRACT BETWEEN THE PORT PUBLISHING COMPANY AND THE WILMINGTON PRINTING PRESSMAN AND ASSISTANT'S UNION, No. 186, AND

CLAIM OF PETITIONERS UNDER CONTRACT BETWEEN THE PORT PUBLISHING COMPANY AND THE WILMINGTON TYPOGRAPHICAL UNION, No. 556.

(Filed 3 February, 1950.)

1. Master and Servant § 2a—

An agreement between an employer and its employees which makes union membership or non-union membership a prerequisite of employment, is void in this jurisdiction. G.S. 95-79 *et seq.*

2. Contracts § 7—

While a provision in a contract which is against public policy will not be enforced, it will not affect other valid provisions of the contract when such provisions are severable and may be enforced entirely independently of the illegal provision.

3. Master and Servant § 2a—

Provisions for a "closed shop" in agreements executed subsequent to the effective date of Chap. 328, Session Laws of 1947, and such provisions in extensions of prior contracts executed subsequent to that date, are contrary to public policy and void.

4. Same—

While G.S. 95-79 *et seq.* preclude "closed shop" agreements, the statute does not preclude provisions relating to working conditions, hours, rates of pay, training of journeymen, overtime, vacation and severance pay,

and such provisions are severable and may be sustained irrespective of the invalidity of a "closed shop" provision in the contract.

5. Receivers § 12c—

Employees under a contract providing for paid vacations have a lien against the receiver of the employer for ⅙ of their vacation pay, since this amount was earned during the two months next preceding the institution of insolvency proceedings. G.S. 55-136.

6. Same—

Employees under a contract providing for severance pay are not entitled to a lien for such pay against the receiver, since severance pay is not wages earned. G.S. 55-136.

BARNHILL, J., concurs in result.

APPEAL by C. D. Hogue, Jr., Receiver, from *Nimocks, J.*, at June Term, 1949, of NEW HANOVER.

The Port Publishing Company, a North Carolina corporation, ceased operations on 8 May, 1948, and went into receivership on 14 May, 1948.

The Port Publishing Company entered into a labor contract with the Wilmington Printing Pressman and Assistant's Union, No. 186, on 1 October, 1947, and extended an existing labor agreement with the Wilmington Typographical Union, on 1 December, 1947. Both contracts, in addition to provisions concerning wages, hours, overtime, vacations, severance pay, etc., contained a "closed shop" agreement.

The agreement between the Port Publishing Company and the Wilmington Printing Pressman and Assistant's Union contains the following provisions relative to "vacation" and "severance" pay: "Employees who have held situations during the twelve months ending April 1, 1948, shall be entitled to two weeks vacation with pay. . . . In event of consolidation or suspension, all employees affected shall receive severance pay of not less than two weeks pay at their regular rate of pay." The contract of the other Union provides for a two weeks vacation with pay and not less than three weeks' severance pay. All the petitioning employees had been with the Port Publishing Company long enough, on 8 May, 1948, to be entitled to "vacation" and "severance" pay under the terms of the respective contracts.

All the petitioning employees were paid their regular salaries up to the date the corporation ceased operations, but the Receiver declined to pay the amounts claimed by the employees as "vacation" and "severance" pay. The amounts claimed are not in dispute.

This cause came on for hearing before his Honor, at the June Term, 1948, of the Superior Court of New Hanover County, and all parties agreed that the judgments might be signed *nunc pro tunc,* out of term and out of the District. Judgments were signed and filed 5 July, 1949,

in favor of the petitioning employees under the respective contracts, in which the trial judge held the petitioning employees were entitled to priority payment out of the funds in the hands of the Receiver for "vacation" and "severance" pay within the meaning and purview of G.S. 55-136; and that the contracts between these respective Unions and the Publishing Company were valid and enforceable, except the provisions in the contracts establishing a "closed shop." The vacation pay was limited to the pro rata part thereof which the respective employees earned in the two months next preceding the date when the corporation was placed in receivership.

The Receiver appeals and assigns error.

Clayton C. Holmes for Typographical Union, No. 556.

Elbert A. Brown for Wilmington Printing Pressman and Assistant's Union, No. 186.

E. H. Bellamy, C. D. Hogue, Sr., Wallace C. Murchison, and R. E. Calder for Port Publishing Company.

DENNY, J. An agreement entered into by and between an employer and its employees, in which it is agreed that the employer will only employ members of a union, or that it will only employ non-union members, is void in this jurisdiction, in so far as it makes union membership or non-union membership a prerequisite to employment. Chapter 328, 1947 Session Laws of North Carolina, G.S. 95-79 to 95-84; *S. v. Whitaker,* 228 N.C. 352, 45 S.E. 2d 860, which decision was affirmed by the Supreme Court of the United States, and reported in 335 U.S. 525, 93 L. Ed. 301.

A provision in a contract which is against public policy will not be enforced. *Glover v. Ins. Co.,* 228 N.C. 195, 45 S.E. 2d 45; *Cauble v. Trexler,* 227 N.C. 307, 42 S.E. 2d 77; *Waggoner v. Publishing Co.,* 190 N.C. 829, 130 S.E. 609; *Phosphate Co. v. Johnson,* 188 N.C. 419, 124 S.E. 859; *Burbage v. Windley,* 108 N.C. 357, 12 S.E. 829, 12 L.R.A. 409. Even so, when such agreement contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced. *Glover v. Ins. Co., supra; Annuity Co. v. Costner,* 149 N.C. 293, 63 S.E. 304, 17 C.J.S., Sec. 289, p. 674, *et seq.,* and 12 Am. Jur., Sec. 220, p. 738, *et seq.,* where the general rule governing such contracts is stated in the following language: "It is well established that the fact that a stipulation is unenforceable because of illegality does not affect the validity and enforceability of other stipulations in the agreement, provided they are severable from the invalid portion and capable of being construed divisibly. Moreover, it makes no difference whether there are

two distinct promises, whether there is one promise that is divisible, or whether the consideration for the two promises is entire or apportionable. At least this is true where the illegal provision is clearly separable and severable from the other parts which are relied upon and does not constitute the main or essential feature or purpose of the agreement. If, however, any part of a nonseparable agreement is void for illegality or reasons of public policy, the taint extends to every part of it and neither party can enforce any of its provisions against the other."

In the instant case, the "closed shop" agreement between the Port Publishing Company and the Wilmington Typographical Union was legal and valid until the contract was extended on 1 December, 1947, at which time it became *eo instante* null and void, being in contravention of the provisions contained in G.S. 95-78 to 95-84. Likewise, the agreement which was entered into between the Port Publishing Company and the Wilmington Typographical Union, on 1 October, 1947, containing a "closed shop" agreement, was void in so far as it provided for a "closed shop." Therefore, the provision in these respective contracts providing for a "closed shop," being in violation of the above statutes, and contrary to public policy, such provision could constitute no part of the consideration for the execution or extension of the agreements. And likewise, any right under the terms of the respective contracts which must be bottomed on the validity of the "closed shop" agreement cannot be enforced.

However, it is only when the illegal element in a contract permeates the entire agreement that such contract is void in its entirety. *Shoe Co. v. Department Store,* 212 N.C. 75, 195 S.E. 9; *Marshall v. Dicks,* 175 N.C. 38, 94 S.E. 514; *Fashion Co. v. Grant,* 165 N.C. 453, 81 S.E. 606; *Culp v. Love,* 127 N.C. 461, 37 S.E. 476. In each of these cases, the relief sought was bottomed on an illegal contract, one prohibited by law or contrary to public policy, consequently the relief sought was denied.

It is the declared public policy of North Carolina "that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association." But there is nothing in this policy to indicate that the Legislature intended to restrict the power of an employer and its employees to contract in the field of labor relations, in any respect, except as to certain matters set forth in G.S. 95-79 to 95-84. And the provisions contained in the contracts under consideration relative to working conditions, hours, rate of pay, training of journeymen, overtime, vacation and severance pay, are not violative of the above statutes, and are, therefore, severable and may be sustained irrespective of the invalidity of the "closed shop" provisions in the contracts.

There is no dispute between the parties as to the terms of the respective agreements relative to hourly wages, "vacation" or "severance" pay.

Therefore, the determinative question presented is whether or not the petitioners are entitled to a prior lien for "vacation" and "severance" pay, within the provisions of G.S. 55-136, the pertinent part of which reads as follows: "In case of the insolvency of a corporation, partnership or individual, all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual, which lien is prior to all other liens that can be acquired against such assets. . . ."

It was the intent of the Legislature to create a lien on the assets of an employer in favor of his employees who come within the purview of the statute, for the amount of all wages earned during the two months next preceding the date of the institution of insolvency proceedings. *Iron Co. v. Bridge Co.,* 169 N.C. 512, 86 S.E. 184. And these petitioners earned one-sixth of their vacation pay during such period. This view is in accord with the interpretation given to priority payments for wages under our Bankruptcy Act, 11 U.S.C. 104 (a) (2). *State of California v. Sampsell* (Ninth Circuit), 172 F. 2d 400; *Kavanas v. Mead* (Fourth Circuit), 171 F. 2d 195; *In re Kinney Aluminum Co.* (Cal.), 78 F. Supp. 565; *In re B. H. Gladding Co.* (R. I.), 120 Fed. Rep. 709.

On the other hand, "severance" pay is in the nature of liquidated damages which was agreed upon in advance, as compensation for any loss that might be sustained by the employees of the Port Publishing Company "in the event of the consolidation or suspension" of the corporation, and not for wages earned. Such pay, in our opinion, does not come within the purview and meaning of the provisions of G.S. 55-136. *In re Public Ledger* (Third Circuit), 160 F. 2d 762, upon which the appellees are relying, does not sustain their position. The decision does not purport to construe our statute nor does it hold that the priority given to the payment of certain wages due by a bankrupt estate, under the priority provisions of our Federal Bankruptcy Act, may include "severance" pay. The Court held that since the Trustees of the bankrupt estate continued the operation of the business and ratified the labor contract, which had been entered into theretofore by and between the bankrupt and its employees, "severance" pay was allowable, not as a preferred lien but as an administrative expense.

It follows, therefore, that the judgment entered below will be modified to conform to this decision.

Modified and affirmed.

BARNHILL, J., concurs in result.

MOZELLE BROWDER v. CITY OF WINSTON-SALEM AND ALEXANDER APARTMENT COMPANY.

(Filed 3 February, 1950.)

1. Negligence § 4a—Evidence held insufficient to show negligence on part of building owner in regard to snow and ice on sidewalk.

Evidence that "packed down" snow and ice was somewhat thicker on the north side of defendant's building than at exposed places along the street, and that at times water seeped from the gutters and eaves of defendant's building and dripped on the sidewalk, without evidence that on the occasion in question water coming from the building appreciably increased the thickness of the ice or that, even if it did, the added thickness enhanced the obvious hazard to pedestrians, *is held* insufficient to be submitted to the jury on the theory of defendant owner's negligence in permitting a dangerous condition to develop in front of the building causing the fall of plaintiff on the sidewalk.

2. Evidence § 5—

It is a matter of common knowledge that snow and sleet on the north side of a building where it is sheltered from the sun will remain after snow and sleet in places which are exposed have melted.

3. Municipal Corporations § 14a: Evidence § 29½—

In an action against a municipality to recover for a pedestrian's fall on the snow and ice on a sidewalk, an allegation in the city's original answer, stricken by order of court, set up an ordinance requiring property owners to keep the sidewalks in front of their property free from ice and snow. *Held:* The exclusion of the allegation, offered as evidence by plaintiff, was not prejudicial, since such allegation does not tend to show negligence on the part of the city, and therefore is not pertinent and material.

4. Municipal Corporations § 14a—

In an action against a city by a pedestrian to recover for a fall on sleet and snow on a sidewalk, the exclusion of a municipal ordinance requiring property owners to keep the sidewalks in front of their premises free of ice and snow is not prejudicial, since neither the enactment nor existence of the ordinance tends to prove negligence on the part of the city in failing to remove the ice and snow from the sidewalk.

5. Same—

Mere slipperiness of a sidewalk occasioned by smooth and level ice and snow, formed by nature, with evidence that the accident in suit occurred the second morning after a general precipitation, but without evidence that the condition at the place in question was so exceptional in nature as to demand prior or preferential attention, *is held* insufficient to be submitted to the jury on the question of the negligence of the city in failing to remove the ice and snow from the sidewalk.

APPEAL by plaintiff from *McSwain, Special Judge,* March Term, 1949, FORSYTH.

Civil action to recover compensation for physical injuries alleged to have been caused by the negligence of the defendants.

Plaintiff lives in an apartment house owned by defendant corporation, located on the south side of West Fourth Street near the business center of Winston-Salem. The apartment house has a marquee over the front door about six feet wide and twelve feet long, protruding over the sidewalk. The eaves of the building extend over the sidewalk for about three feet. The marquee and eaves and gutters are in such a state of disrepair that water at times seeps or drips therefrom, falling on the sidewalk. During cold weather, ice has been seen on the sidewalk where the water fell.

On 25 December 1947 there was a precipitation of sleet and snow in the Winston-Salem area, forming a coverage on the sidewalks to the depth of about 2.6 inches. On the 26th, the temperature rose and remained above forty degrees for some hours. As a result, the ice and snow on the sidewalks, where exposed to the sun, melted and became slushy or "slashy." However, it did not melt to any appreciable extent in front of the apartment house and other places where it was shaded from the sun. The temperature again fell below freezing before daylight on the 27th, so that on that morning the covering of sleet and snow in front of the apartment building was "frozen hard." It was "watery" ice, "slippery." It was fairly smooth and of uniform depth.

About 10:30 a.m. on the 27th, plaintiff left the apartment house to visit her sister who lived in the Winston Apartments on the same side of the street about thirty feet distant. She then saw and observed the existing condition of the sidewalk. About 11:45 she started back to her room. After she had gone about two feet past the corner of the apartment building she slipped and fell. She suffered a fracture of her right femur and other injuries.

At the time of the accident the layer of snow and sleet was relatively smooth all the way across the sidewalk and was free of ridges, holes, dished out places or breaks of any kind. It was a bright, sunshiny day, and the condition of the sidewalk was "open and obvious" to her.

When the plaintiff concluded her evidence in chief the court, on motion of defendants, entered judgment of nonsuit and plaintiff excepted and appealed.

Eugene H. Phillips for plaintiff appellant.

Womble, Carlyle, Martin & Sandridge for defendant appellee City of Winston-Salem.

Deal & Hutchins for defendant Alexander Apartment Company, appellee.

BARNHILL, J. The plaintiff bottoms her case against the defendant corporation on the allegation that it negligently permitted "much of the rain, melted snow, and other waters that fell, formed on, or were collected on the roofs, bay windows, gutters, and other portions of the premises there maintained . . . to fall and drain onto the public sidewalk and that the waters so draining and falling onto the public way frequently formed into ice, thereby unlawfully obstructing the use of the said sidewalk and rendering the same unsafe for pedestrian travel" and that it negligently permitted such condition to develop on the days immediately preceding her injuries.

There is testimony that at times water seeped from the gutters and eaves of the building and dripped on the sidewalk. The record, however, is devoid of any evidence that such seepage occurred on the days preceding the accident complained of. There is no testimony that any water coming from the building appreciably increased the thickness or slipperiness of the condition formed by nature or in any wise enhanced the hazard thereof.

Plaintiff testified that she slipped and fell. While she did not undertake to explain the cause, we may assume that it was due to the slipperiness of the icy layer of snow. Even so, slipping and falling alone is not sufficient to establish negligence. There must be some evidence that the defendant in fact was a party to the creation of the condition which caused her fall.

It is true there is evidence that on the morning of the 27th the "packed down" snow in front of the building was somewhat thicker than on the north side of the street and other exposed places. That is understandable, for it is a matter of common knowledge that snow and sleet on the north side of a building, or in low places, or in forests where it is sheltered from the sun will remain for days after the temperature has risen well above freezing. Frequently, it does not disappear until after a rain comes. *S. v. Baldwin,* 226 N.C. 295, 37 S.E. 2d 898; *S. v. Vick,* 213 N.C. 235, 195 S.E. 779. Certainly the mere circumstance of the relative thickness of the layer of packed snow in front of the building, under the circumstances here disclosed, will not justify the inference that water dripping from the building produced the condition. Even if it did, we may not say, on this record, that the added thickness enhanced the obvious hazard to pedestrians. For cases bearing on the liability of an abutting owner for injury resulting from the presence of ice and snow on the sidewalk see Anno. 34 A.L.R. 409.

In its original answer the defendant city pleaded its ordinance requiring property owners to keep the sidewalk in front of their premises free of ice and snow and alleged that if it were negligent then its liability is

only secondary. This section was stricken by order of the court and an amended answer was filed.

The plaintiff sought to introduce this section in the original answer, and also the ordinance, as against the city, but not as against the defendant corporation. Both, on objection, were excluded and plaintiff excepted.

Unquestionably the affirmative statement in the original answer, if pertinent and material, was admissible in evidence. *Adams v. Utley,* 87 N.C. 356; *Winborne v. McMahan,* 206 N.C. 30, 173 S.E. 278; Stansbury, N. C. Evidence, 380. But the allegation offered in no wise tends to establish negligence on the part of the city. It expressly denied negligence and merely sought the protection of the doctrine of primary and secondary liability in the event of an adverse verdict. The exception to the exclusion of the tendered paragraph of the original answer is without merit.

Nor was there error in the exclusion of the ordinance. Neither its enactment nor its existence tends to prove negligence on the part of the city in failing to remove the sleet and snow from the sidewalk. Indeed, it tends only to show that the city had provided a way for the prompt removal thereof. The exclusion of the ordinance, if prejudicial, was harmful to the city rather than to the plaintiff. *Calder v. Walla Walla,* 33 P. 1054 (Wash.).

The testimony tends to show that the defendant city had not removed all of the "sleety" snow from the sidewalks on the second morning after a general precipitation. There is no evidence that the condition in front of the apartment house was so exceptional in nature as to demand prior or preferential attention. This, in our opinion, is insufficient to warrant an inference of negligence such as would require the submission of issues to a jury. *Hawkins v. City of N. Y.,* 66 N.Y.S. 623; *Harrington v. Buffalo,* 24 N.E. 186 (N.Y.); *Swan v. Indiana,* 89 A. 664 (Pa.); *Zunz v. N. Y.,* 103 N.Y.S. 222; *Byington v. Merrill,* 88 N.W. 26 (Wisc.); *Bailey v. Oil City,* 157 A. 486 (Pa.); *Holbert v. City of Philadelphia,* 70 A. 746.

The mere slipperiness of a sidewalk occasioned by smooth or level ice or snow, formed by nature, is not sufficient to charge the municipality with liability for an injury resulting therefrom where the walk itself is properly constructed and there is no such accumulation of ice and snow as to constitute an obstruction. *Cresler v. Asheville,* 134 N.C. 311; Anno. 13 A.L.R. 18; 80 A.L.R. 1154.

As a general rule a municipality is not liable for injuries caused by the formation of ice and snow from natural causes where the sidewalk itself is properly constructed, Anno. 80 A.L.R. 1154, if there are no dangerous slopes or ridges and the ice or snow has not been permitted to

remain on the sidewalk so long that it has become so rough and uneven that it is difficult or dangerous for persons to pass over it. Anno. 80 A.L.R. 1156.

Other authorities which discuss the liability of a municipality, under varying circumstances, for conditions caused by ice or snow may be found in Anno. 13 A.L.R. 18 and 80 A.L.R. 1151.

Since we are of the opinion the plaintiff has failed to make out a case of negligence as against either defendant, we need not discuss or decide the contention that in any event the plaintiff was contributorily negligent.

The judgment below is

Affirmed.

N. L. BAILEY, ADMINISTRATOR OF THE ESTATE OF NATHAN J. BAILEY, DECEASED, v. FRED R. MICHAEL; FRED R. MICHAEL, GUARDIAN FOR ELMA B. MICHAEL; LUTHER MICHAEL REAVES, EXECUTOR OF EDWARD MICHAEL ESTATE T/A MICHAEL'S STORE.

(Filed 3 February, 1950.)

1. Negligence § 19c—

Nonsuit on the ground of contributory negligence will not be granted if it is necessary to rely either in whole or in part on defendant's evidence.

2. Same—

Nonsuit on the ground of contributory negligence will not be granted unless plaintiff's own evidence, taken in the light most favorable to him, establishes contributory negligence as a sole reasonable inference or conclusion that can be drawn therefrom, and nonsuit on this ground can never be allowed when the evidence as to the controlling and pertinent facts is conflicting.

3. Automobiles § 8i—

The failure to observe a stop sign duly erected before an intersection is not negligence *per se*, but is only evidence of negligence to be considered along wtih other facts and circumstances adduced by the evidence. G.S. 20-158.

4. Automobiles § 18g (5)—

While physical facts at the scene may speak louder than the testimony of witnesses, the failure of the driver of a car to retain control over it and bring it to a stop after a collision in which he has been seriously or fatally injured is ordinarily but a circumstance to be considered by the jury together with other facts and circumstances adduced by the evidence.

5. Automobiles § 18h (3)—Nonsuit on ground of contributory negligence held properly refused on conflicting evidence.

Intestate drove his car into an intersection with a dominant highway and was struck on his left side by a car traveling along the dominant

highway. Plaintiff's evidence was to the effect that his intestate was driving slowly and came practically to a stop before entering the intersection in obedience to a stop sign erected on his street, and that defendants' car entered the intersection at a speed of 40 miles per hour. Defendants' evidence was to the effect that intestate's car entered the intersection at a speed of 45 or 50 miles an hour without stopping, and that defendants' car approached the intersection at about 20 miles per hour. *Held:* Nonsuit on the ground of contributory negligence was properly refused upon the conflicting evidence.

6. Death § 4—

The failure of the complaint in an action for wrongful death to allege that the action was instituted within one year of intestate's death does not render the complaint demurrable.

APPEAL by defendants from *Coggin, Special Judge,* at April Term, 1949, of DAVIDSON.

This is an action for wrongful death, instituted 12 November, 1948.

About 9:00 a.m., on 6 December, 1947, the plaintiff's intestate, a young man 21 years of age, accompanied by his sister, was driving his Plymouth car north on Robbins Street, in the City of Lexington, North Carolina, at which time Robert Athay, an employee of the defendants, was operating the defendants' 1937 Chevrolet car in an easterly direction on West 7th Avenue. West 7th Avenue, as it approaches the intersection of Robbins Street from the west, runs in a northerly direction and at a point about 30 or 40 feet from the intersection of Robbins Street curves in an easterly direction. According to the evidence, the driver of a car approaching Robbins Street from the west, on West 7th Avenue, would have to be within 50 feet of the intersection to see a distance of 30 feet to the south down Robbins Street.

The plaintiff's evidence tends to show that his intestate approached the intersection at a speed of 15 or 20 miles an hour; that he practically stopped his car before entering the intersection and looked both to his right and to his left. As he entered the intersection, he was on the right-hand side of Robbins Street. The word STOP was painted in large letters on Robbins Street about 15 feet south of the intersection. The collision occurred slightly to the right of the center of Robbins Street, and a few feet south of the center of West 7th Avenue. The plaintiff's intestate's automobile was hit about the center of the left side by the defendants' Chevrolet automobile with such force as to break the steel reinforced hinge pillar post, and the car was knocked forward, turned over and came to rest on its left side, about 98 feet north of the southeast intersection of Robbins Street and West 7th Avenue, headed south on Robbins Street. Plaintiff's intestate died within some thirty minutes, from injuries sustained in the collision. Plaintiff offered evidence tend-

ing to show that the Chevrolet car of the defendants was being operated at a speed of 40 miles per hour when it entered the intersection where the crash occurred; and that it began to skid about three feet before it entered the intersection and continued to do so until it collided with the left side of the intestate's car; that plaintiff's intestate lost control of his car when it was hit; that the car began to skid about 6 feet south of where the collision occurred and the tire marks continued in a northeasterly direction and then north for a distance of 41 feet from the point where the first skid marks were visible.

The defendants offered evidence tending to show that plaintiff's intestate's car entered the intersection at a speed of 45 to 50 miles per hour, without stopping; that defendants' car was proceeding at the rate of about 20 miles per hour as the driver approached the intersection. The defendants' car, as a result of the contact with the intestate's car, pivoted to the left and came to rest just left of the center of Robbins Street, headed north, with its right rear wheel only a few feet from the point where the collision occurred. The driver of the defendants' car testified as follows: "Before I got to the intersection, I heard this car coming. This was right before I saw the car. I had done applied the brakes. . . . I was 50 feet from the intersection when I first saw him. . . . As I approached the intersection I was slowing down at the time, but I had enough speed that I could not stop my car until it got into the intersection. I could not stop the car quicker than I did. . . . I was approaching the intersection at a speed that I could not stop before I got into the intersection."

From a verdict and judgment for the plaintiff, the defendants appeal and assign error.

Sim A. DeLapp, Hubert E. Olive, and Stoner & Wilson for plaintiff.

Joe H. Leonard and Don A. Walser for defendants.

DENNY, J. The defendants assign as error the refusal of the court below to sustain their motion for judgment as of nonsuit on the ground that the plaintiff's intestate was guilty of contributory negligence as a matter of law, citing *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Henson v. Wilson,* 225 N.C. 417, 35 S.E. 2d 245; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 22; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355, and G.S. 20-158.

A motion for judgment as of nonsuit on the ground of contributory negligence on the part of a plaintiff or his intestate in actions for wrongful death, will not be granted if it is necessary to rely either in whole or in part on testimony offered by the defense to sustain the plea of con-

tributory negligence. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307, and cited cases.

The burden of proof on the issue of contributory negligence being on the defendants, they were not entitled to a judgment as of nonsuit, unless the plaintiff's evidence, taken in the light most favorable to him, so clearly established such negligence that no other reasonable inference or conclusion could be drawn therefrom. *Dawson v. Transportation Co.,* 230 N.C. 36, 51 S.E. 2d 921; *Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 131; *Cummins v. Fruit Co.,* 225 N.C. 625, 36 S.E. 2d 11; *McCrowell v. R. R.,* 221 N.C. 366, 20 S.E. 2d 352; *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Hayes v. Telegraph Co.,* 211 N.C. 192, 189 S.E. 499.

The evidence of the plaintiff and the defendants is in sharp conflict, but, as said by *Stacy, C. J.,* in *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793: "It is only when the plaintiff proves himself out of court that nonsuit may be entered on the issue of contributory negligence. *Phillips v. Nessmith,* 226 N.C. 173, 37 S.E. 2d 178; *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601. Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court. *Emery v. Ins. Co.,* 228 N.C. 532, 46 S.E. 2d 309; *Bank v. Ins. Co.,* 223 N.C. 390, 26 S.E. 2d 862; *Shell v. Roseman,* 155 N.C. 90, 71 S.E. 86." This is in accord with what was said in *Battle v. Cleave,* 179 N.C. 112, 101 S.E. 555, by *Hoke, J.,* and quoted with approval by *Brogden, J.,* in *Williams v. Express Lines,* 198 N.C. 193, 151 S.E. 197, as follows: "The burden of showing contributory negligence, however, is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof, nor where it is necessary in support of the motion to rely, in whole or in part, on evidence offered for the defense."

The defendants contend, however, that the failure of plaintiff's intestate to bring his car to a complete stop before entering the intersection was a violation of G.S. 20-158. Conceding the failure of plaintiff's intestate to stop his car before entering the intersection, we have held that failure to observe a stop sign is not negligence *per se* or *prima facie* negligence, but only evidence thereof, which may be considered by the jury, along with the other facts and circumstances adduced by the evidence, in passing upon the question of negligence. *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Groome v. Davis,* 215 N.C. 510, 2 S.E. 2d 771.

The authorities relied upon by the appellants are not controlling on this record. While it is true that sometimes the physical facts speak louder than the witnesses, *Powers v. Sternberg, supra;* but where the

driver of a car is seriously or fatally injured in a collision, the control or lack of control exercised by such driver in bringing the car to a stop after the collision, is ordinarily but a circumstance to be considered by the jury together with the other facts and circumstances adduced by the evidence, in passing upon the question of negligence or contributory negligence. The facts in this case warranted the submission of the issue of contributory negligence to the twelve.

The defendants also demurred *ore tenus,* in this Court, to the plaintiff's complaint on the ground that it fails to allege that the action was instituted within one year of his intestate's death. The demurrer is overruled. *Colyar, Admrx., v. Motor Lines, ante,* 318.

In the trial below, we find

No error.

T. C. BOWIE, JR., JEAN D. BOWIE AND ELIZABETH B. REDD v. TOWN OF WEST JEFFERSON, AND W. R. CAMPBELL, TREASURER AND TAX COLLECTOR OF THE TOWN OF WEST JEFFERSON.

(Filed 3 February, 1950.)

1. Constitutional Law § 20a—

Due process of law means notice and hearing, and in that order.

2. Same—

Where a statute fails to provide requisite notice and hearing it must be declared unconstitutional notwithstanding that in its application administrative officials may give notice, since the statute must be tested by what it authorizes to be done rather than what has been done under it.

3. Taxation § 26½—

An act which permits the governing board of a town to list, value and revalue all property within its limits separately and independently of the general statute (G.S. 105-333) without providing for notice and hearing as to such valuations, and without setting up precise standards for evaluation, contravenes due process of law and is unconstitutional. Chap. 627, Session Laws of 1947.

4. Constitutional Law § 10b—

It is the duty of the Court to declare a statute unconstitutional when it is clearly so.

DEFENDANTS' appeal from *Sink, J.,* July Civil Term, 1949, ASHE Superior Court.

R. F. Crouse and Johnston & Johnston for defendants, appellants.

T. C. Bowie, Jr., for plaintiffs, appellees.

SEAWELL, J. This action was brought under G.S. 105-406 to recover from the Treasurer of the Town of West Jefferson taxes paid by the plaintiffs under protest. There is no controversy over the fact that the taxes were paid under protest and that suit to recover back was brought in apt time.

The controversy was, by consent, heard before the trial judge without a jury and terminated in a judgment for plaintiffs from which the defendants appealed.

The plaintiffs' protest rests on the contention that Chapter 627 of the Session Laws of 1947, under which the taxes were levied and collected, is in contravention to the provisions of the State and Federal Constitutions relating to due process; and that it also violates Article V, Section 3, of the North Carolina Constitution requiring that "taxes on property shall be uniform as to the class of property taxed." The latter objection refers to the provision in the statute permitting the town to put property within its confines upon a different valuation from that which obtains in the county in which it is located, thus resulting in a valuation, contended to be very much higher in the Town, while a different and lower valuation is put upon the same property for county taxation.

In view of the conclusion we have reached it is not necessary to decide whether the uniformity clause of the State Constitution, Art. V, Sec. 3, is applicable to this situation or vitiates the levy and collection of the tax. We direct our attention to the objection to the statute and levy thereunder as wanting in due process.

The challenged statute reads as follows:

> "Chapter 627. An act to Permit the Governing Board of the Town of West Jefferson to List, Value and Revalue Property for the Purposes of Town Taxation Without Regard to the Listing Valuation and Revaluation of such Property for Purposes of State and County Taxation.
>
> "That the General Assembly of North Carolina do enact:
>
> "Section 1. The governing boards of the Towns of West Jefferson and Morehead City may, in their discretion, list, value and revalue all property for the purposes of town taxation separately and independently from and without regard to any listing, valuation or revaluation of such property for purposes of State and County Taxation.
>
> "Sec. 2. All laws and clauses in conflict with this Act are hereby repealed.
>
> "Sec. 3. This Act shall be effective upon its ratification.

"In the General Assembly read three times and ratified, this the last day of April, 1947. Ch. 627, P. L., 1947."

The familiar provisions of the Constitution of the United States read as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The parallel provisions of the North Carolina Constitution read:

"No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

An examination of the above statute shows that it provides no machinery whatever for the listing, assessing or valuation of the property, or for any notice to the taxpayer or hearing, or of appeal. Nor does it by reference to any general statute incorporate any such provisions in the act. The statute seems to expect supplementation in this respect by those who administer it.

Due process of law means notice and hearing, and in that order. *Gunter v. Town of Sanford,* 186 N.C. 452, 120 S.E. 41. It is a minimum content of any procedure under the guise of legislative enactment by which a person may be deprived of his life, liberty or property.

The Machinery Act, G.S. 105-333, requires that towns and cities accept for imposition of their own tax the valuation put upon property within their limits by the County Board of Assessment, except where the town or city lies in more than one county, when special provision is made for assessment or valuation of property therein for tax purposes by G.S. 105-334. This latter section is urged by the defense as a precedent of the power given to the Town of West Jefferson, although the latter lies wholly within the County of Ashe.

Without raising any question as to the constitutionality of G.S. 105-334—which statute was intended to produce uniformity within the city limits—where otherwise almost certain inequality would exist because of the several county appraisals—we may say that the constitutionality of a statute is not proved by its alleged similarity to another statute which itself has not passed the acid test.

Be that as it may, the Town of West Jefferson stepped completely out of the provisions of G.S. 105-333 and substituted no proceeding containing the essentials we have mentioned, and did not by reference seek aid from any other helpful statute. The statute has achieved a completely insular position and must operate *ex propria vigore.* Its constitutionality must rest not only on what it contains, but on what it lacks. A delegation of power may be valid in itself under proper constitutional limitations; without them, invalid.

With reference to the want of notice, it is pointed out by the defendant that notice similar to that required in the General Statutes relating to county taxes was given by publication. Where the town board got authority to do this does not appear; in this respect the statute seems to have been supplemented *ex gratia;* and whether future Boards would be so kind is not certain. As expressed in *Stuart v. Palmer,* 74 N.Y. 183, 188: "The constitutional validity of law is to be tested not by what has been done under it but by what may, by its authority, be done." McGehee, Due Process of Law, p. 82. The security of life, liberty and property cannot be wholly left to the continuing benignity and sense of justice and equity of those to whom is given extraordinary powers to take at will. They must rest in law; and the statute must exemplify the more fundamental and controlling rules of the Constitution.

Not all tax procedures, of course, are subject to the rule we have outlined, that is the presence in the statute of a provision requiring notice and permitting hearing; in some of them the tax is imposed on a declaration or report of the taxpayer, and the amount of the tax is merely a matter of mathematical computation. But where the tax is imposed or predicated on a property appraisal by a board of assessment or other board exercising *quasi*-judicial functions, the procedure for manifest reasons, amongst them the want of precise standards, is by virtually unanimous accord brought within the rule. Cooley on Taxation, 625; 51 Am. Jur., Taxation, sec. 35. In our own jurisdiction it is not an open question: *Lexington v. Lopp,* 210 N.C. 196, 197, 185 S.E. 766; *Person v. Watts,* 184 N.C. 499, 514, 115 S.E. 336; *Lumber Co. v. Smith,* 146 N.C. 199, 59 S.E. 653; *R. R. v. Alamance County,* 77 N.C. 4.

We agree with appellant that the Court should exercise the extraordinary power of declaring an act of the Legislature unconstitutional with the greatest of caution, but whatever degree of conviction in that respect must dominate the action of the Court, we feel here that the duty is clear.

For the reason stated, we are constrained to hold the cited Session Act under which this tax was levied and collected repugnant to the constitutional provisions we have quoted. It follows that the judgment of the court below is

Affirmed.

STATE v. WALTER HALE.

(Filed 3 February, 1950.)

1. Criminal Law § 41g—

The rule that the incriminating testimony of an accomplice should be scrutinized applies whether such testimony be supported or unsupported by other evidence in the case.

2. Criminal Law § 53j—

While the court is not required to charge the jury as to the credibility of the testimony of an accomplice in the absence of a special request, when the court voluntarily undertakes to charge the jury on this aspect, it is under duty to state the rule correctly as applied to the evidence in the case.

3. Same—

An instruction to the effect that the State contended that the testimony of accomplices offered by it was supported by other testimony adduced, followed by an instruction that the unsupported testimony of an accomplice should be scrutinized, *is held* erroneous as susceptible to the interpretation that if the testimony of an accomplice be supported, the rule of scrutiny would not apply.

APPEAL by Walter Hale from *Phillips, J.,* at February Term, 1949, of FORSYTH.

Criminal prosecution on indictment charging Walter Hale, Grady Jones, Porter Stack and Claude Weldy, Jr., with (1) conspiring to break and enter the dwelling house of Harry Huffman; (2) breaking and entering; (3) larceny, and (4) receiving stolen goods.

The defendant, Porter Stack, has not been apprehended.

The defendants, Grady Jones and Claude Weldy, Jr., entered general pleas of guilty and were used as witnesses against Walter Hale, who alone was tried on his plea of not guilty.

The evidence for the prosecution is to the effect that on 13 January, 1949, the home of Harry Huffman in Winston-Salem was forcibly entered, a wall safe prized open and $17,600 taken therefrom.

The evidence of Claude Weldy, Jr., and Grady Jones, is to the effect that the crime was planned by them with Walter Hale and Porter Stack, and whatever the theft brought was to be divided equally among them.

Walter Hale denied any and all connection with the conspiracy or the crime. Ann Lumley, a witness for the prosecution, identified Hale as one of the occupants of the car used in the theft and hence one of the conspirators.

The jury returned a verdict of guilty on the first two counts in the bill, not guilty on the third, and the fourth was dismissed by the court.

The three defendants, Grady Jones, Claude Weldy, Jr., and Walter Hale, were each sentenced to imprisonment in the State's Prison for a term of not less than five nor more than ten years.

The defendant, Walter Hale, appeals, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and John R. Jordan, Jr., Member of Staff, for the State.

Deal & Hutchins, Fred S. Hutchins, and John H. Folger for defendant.

STACY, C. J. The State's case rests upon the testimony of two accomplices, and the supporting evidence of Ann Lumley. For factual similarity, see *S. v. Rising,* 223 N.C. 747, 28 S.E. 2d 221.

In charging the jury on the weight and credibility to be ascribed to the testimony of Grady Jones and Claude Weldy, Jr., the trial court used this language: "Now the court charges you that the State has offered two witnesses in this case who are accomplices within the meaning of the law. . . . The State insists and contends . . . that their testimony is supported by other facts and circumstances in the case, and that their testimony is not unsupported and does not go to your hands for your consideration as unsupported testimony of an accomplice. . . . Our Court has said this as to the law on accomplices: 'The unsupported testimony of an accomplice, while it should be received by the jury with caution, if it produces convincing proof of the defendant's guilt, is sufficient to sustain a conviction.' That is as to the unsupported testimony of accomplices.

"(C) Now, when the testimony is unsupported, the court charges you that it is your duty to scrutinize such testimony carefully and with care, great care, to see whether or not they are telling you the truth. (D)."

The defendant excepts to the last portion of the charge between (C) and (D), because he says it carries the clear inference that if such testimony be supported, as here contended, it is not to be so scrutinized.

It bears against a witness that he is an accomplice in the crime and he is generally regarded as interested in the event. *S. v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277. The rule of scrutiny, therefore, applies to the testimony of an accomplice whether such testimony be supported or unsupported by other evidence in the case. 20 Am. Jur. 1088; 53 Am. Jur. 483 and 584. Of course, corroboration of such testimony, or the lack of it, may greatly affect its credibility or worthiness of belief in the eyes of the jury. But the rule of scrutiny and the weight of the testimony are different matters—the one belongs to the court; the other to the twelve. *S. v. Beal,* 199 N.C. 278, 154 S.E. 604. The court is not required to charge on the rule in the absence of a request to do so, and

his voluntary reference to it rests in his sound discretion. *S. v. Herring,* 201 N.C. 543, 160 S.E. 891. However, having undertaken to give the jury the rule of law applicable, the court was under the duty to state the rule correctly as applied to the evidence in the case. *S. v. Correll,* 228 N.C. 28, 44 S.E. 2d 334; *S. v. Fairley,* 227 N.C. 134, 41 S.E. 2d 88; *Jarrett v. Trunk Co.,* 144 N.C. 299, 56 S.E. 937.

The charge is susceptible of the interpretation, and we think the jury must have so understood it, that if the testimony of the accomplices were supported by the evidence of Ann Lumley, as the State contended, the rule of scrutiny would not apply. This was apparently prejudicial to the defendant's case.

We have not overlooked the cases in which seemingly similar instructions have been upheld, but in none of the cases so far examined was the question here debated presented or decided.

Consideration of the remaining exceptions is omitted as they may not arise on another hearing.

For the error as indicated a new trial seems necessary. It is so ordered.

New trial.

STATE v. WOODROW LOWRY, JAMES SANDERSON, JOHN L. LOWRY, JOHN C. BROOKS, NASE LOWRY, MOSELAND STRICKLAND AND HORACE LOWRY.

(Filed 3 February, 1950.)

Criminal Law § 29b—

In a prosecution for assault, evidence of a similar assault against another committed by defendant about two months prior to the occurrence under investigation, is competent to show *quo animo,* intent or design on his part.

APPEALS by Woodrow Lowry, James Sanderson, John L. Lowry, and Moseland Strickland from *Burney, J.,* at April Term, 1949, of ROBESON.

Criminal prosecutions on indictments charging the appellants, and others in one indictment, No. 11751, with a felonious assault on Joe Lowry with a deadly weapon with intent to kill, inflicting serious injury, not resulting in death; and a second indictment, No. 11752, charging two of the appellants, Woodrow Lowry and James Sanderson, and another, with a felonious assault on Bromford Lowry with a deadly weapon with intent to kill, inflicting serious injury, not resulting in death; and a third indictment, No. 11753, charging two of the appellants, Woodrow Lowry and James Sanderson, and another, with a felonious assault on John Oxendine, with a deadly weapon, inflicting serious injury

not resulting in death, all against the form of the statute in such cases made and provided and against the peace and dignity of the State.

It seems that on Sunday morning, 30 May, 1948, the appellants and some of their comrades set out to molest travelers on the highway in the vicinity of the homes of Etta Spaulding and Dewey Oxendine in Robeson County. They were armed with guns, rifles and pistols. Apparently their first victim was Joe Lowry whom they found at the home of Etta Spaulding. They shot, beat and kicked him and threatened to kill him.

Next in order of time came Bromford Lowry driving down the highway. His car was shot into, some of the shots passing through the right-hand door and through his pants leg.

Then John Oxendine came driving along and was fired upon by some of the appellants, their bullets hitting the lights and right-hand side of his car.

Three indictments were returned as above indicated, and upon the hearing, they were consolidated and tried together.

Under the first bill, No. 11751, John Lowry, James Sanderson, Moseland Strickland and Woodrow Lowry were each found guilty as charged.

Under the second bill, No. 11752, James Sanderson and Woodrow Lowry were each found guilty of an assault with a deadly weapon.

Under the third bill, No. 11753, James Sanderson and Woodrow Lowry were each found guilty of an assault with a deadly weapon.

From the respective judgments pronounced in each case, the defendants, Woodrow Lowry, James Sanderson, John L. Lowry and Moseland Strickland, appeal, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

Johnson & Johnson for defendants, appellants.

STACY, C. J. There are no exceptive assignments of error appearing on the record which call for elaboration or any special discussion. Indeed, the cases seem to have been tried with care and circumspection. The evidence of a similar assault against another on the part of Woodrow Lowry about two months prior to the occurrence under investigation was competent to show *quo animo,* intent or design on his part, and the jury was so instructed by the trial court. *S. v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352; *S. v. Edwards,* 224 N.C. 527, 31 S.E. 2d 516; *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *S. v. Batson,* 220 N.C. 411, 17 S.E. 2d 511; *S. v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347; *S. v. Payne,* 213 N.C. 719, 197 S.E. 573; *S. v. Smoak,* 213 N.C. 79, 195 S.E. 72.

The exceptions to the charge are without special merit and fall well within the decided cases on the questions presented. They are not sustained, but are overruled and the validity of the trial upheld.

The verdicts and judgments will be sustained.

No error.

DOROTHY B. SCHUELER v. GOOD FRIEND NORTH CAROLINA CORPORATION, TRADING AS GOOD FRIEND SHOP.

(Filed 3 February, 1950.)

Negligence §§ 4f, 19b (2)—Res ipsa loquitur held applicable to collapse of chairs under exclusive control of store proprietor.

Evidence that plaintiff, a patron in a store, was invited to sit on one of a tier of four chairs attached together, that the chairs were of peculiar construction and unbalanced unless secured to the floor, and that when plaintiff sat down on one of the chairs and turned to deposit her purse in the next chair, the whole tier of chairs fell over backward, resulting in serious injury to plaintiff, *is held* sufficient to be submitted to the jury under the doctrine of *res ipsa loquitur*, since the chairs were under the exclusive control of defendant and such an accident presumably would not have occurred if due care had been exercised.

DEFENDANT'S appeal from *Burgwyn, Special Judge,* May 30, 1949 Term, FORSYTH Superior Court.

Womble, Carlyle, Martin & Sandridge for defendant, appellant.

Ratcliff, Vaughn, Hudson & Ferrell for plaintiff, appellee.

SEAWELL, J. This is an action to recover damages for an injury sustained by plaintiff through the alleged negligence of the defendant while shopping in the latter's store in Winston-Salem. She complains that attracted by a window display she entered the store for the purpose of purchasing a child's suit, ascertained that they had the suit in the size she wanted, and was invited by the sales woman to occupy one of a tier of four seats while the merchandise could be brought for her inspection; and that because of the negligent construction of the seats, or negligent failure to properly attach them and secure them so as to prevent injury to those who occupied them, when she had taken her seat and turned to put her purse in the next vacant chair, the whole row of seats toppled over backward, causing her great pain and permanent injury to her spine, which injury she describes in detail.

The answer denies the substantial allegations of the complaint and sets up the defense that plaintiff either wholly caused, or contributed to, her injury through her negligence in throwing her weight against the back of the chair in which she took her seat, causing it to topple over backward with the resultant injury.

The defendant offered no evidence on the trial, but demurred to that of the plaintiff and moved for judgment of nonsuit, which was declined, and defendant excepted. The formal objections and exceptions to the refusal to set aside the verdict and to the ensuing judgment, preserve, for consideration on appeal, the exception to the legal sufficiency of plaintiff's evidence to sustain the verdict; and that is the only question presented by the appeal.

Substantially summarized the plaintiff's evidence is as follows:

On the day of her injury the plaintiff entered the store to purchase a child's suit and inquired of the saleswoman in charge if they had in stock a suit of the size she wanted. She was informed that they had and the saleswoman invited her to have a seat in a chair which was in a tier of four similar chairs attached together. The chairs were of iron construction with a wooden back and seat which seat could be folded up when not occupied. The plaintiff sat down in one of the chairs on the end of the tier and turned to deposit her purse in the next chair, which was empty. Thereupon the whole row of chairs toppled over backward, throwing her violently upon the floor of the store, inflicting an injury to her spine and causing her great pain. Finding that she could not lift herself, she had medical attention in the store and was carried by ambulance to the hospital.

The plaintiff further testified that a week before the injury she went into defendant's store to buy for her little girl a sweater and skirt and at that time occupied a seat in the same row of chairs. They were at that time attached to the floor. She knew this because she tried to move them and could not. She further testified that on the day of her injury: "Four of those chairs are pretty heavy. They were not on rollers or anything like that. It is practically a physical impossibility for the chairs to balance themselves without being screwed to the floor. They have a small base and are larger at the top than at the bottom, so they must be secured to the floor to balance. The legs of each of the four chairs are approximately 15 or 18 inches apart at the bottom. By that, I mean that the front leg of each chair was approximately 15 or 18 inches from the back leg of each chair. The chairs slant back. I believe the seat of the chair was more than 15 or 18 inches wide. It was unbalanced in construction."

There is no other evidence relating to the issue of negligence.

The defendant denies to this occurrence the application of the doctrine *res ipsa loquitur.* All the elements necessary to its interposition are present. The tier of chairs was in the complete control of the defendant; under the circumstances "the accident presumably would not have happened if due care had been exercised." *Jones v. Bland,* 182 N.C. 70, 108 S.E. 344; *Womble v. Grocery Co.,* 135 N.C. 474, 47 S.E. 493; *Stewart v. Carpet Co.,* 138 N.C. 60, 50 S.E. 562.

The instant case is strikingly similar to *Womble v. Grocery Co., supra,* and *Stewart v. Carpet Co., supra,* in the fact that all three deal with facilities furnished by the defendants, and in their control; in the two cited cases, elevators for travel, or use by the employees; in the instant case chairs, of a peculiar construction, for the use of invitees in resting. To make a difference in principle would nullify the reasoning of the rule and make it a matter of arbitrary application.

In *Clark-Davills, Inc., v. Deathe,* 131 S.W. 2d 1091, the facts were similar to those in the case at bar. Mrs. Deathe, an invitee of the mercantile company, sat down in one of six chairs placed for customers' use around a table on which fashion books were placed. The chair collapsed and threw her to the floor. The Court observed in applying the rule:

> "The chair was in the exclusive control and management of appellant. The accident was such, under the evidence, as in the ordinary course of events does not happen, if those who have the control and management use proper control."

In *Harries v. Bond Stores,* 231 Mo. App. 1053, 84 S.W. 2d 153, in a case factually on all fours with the instant case, the Court said:

> "The defendant had the ownership, management, and control of the chair, and had full opportunity to inspect the chair and ascertain its actual defective condition, and had it fulfilled its duty it would not have allowed it to become in such defective condition that it would have injured one of its customers who was invited to sit in it."

The defendant did not pursue its further defense as to contributory negligence, and did not except to the issues as submitted.

The evidence was properly submitted to the jury, and their answer to the issues must stand.

We find

No error.

STATE v. JAMES M. MILLER AND LAWRENCE HUSTON HOLLAR.

(Filed 3 February, 1950.)

1. Indictment § 9—

No indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all of the constituent elements of the crime sought to be charged.

2. Same—

When a special intent is a constituent element of the crime, it must be alleged in the indictment, and failure to do so is fatal.

3. Hunting and Fishing § 3—

An indictment charging that defendants did unlawfully take fish with the use of dynamite and explosives is insufficient to charge the statutory offense of placing explosives in waters of the State for the purpose of taking, killing or injuring fish, and defendants' motion in arrest of judgment is allowed.

4. Criminal Law § 23—

Prosecution under a fatally defective indictment will not bar a subsequent prosecution.

APPEAL by defendants from *Sink, J.,* October Term, 1949, ASHE.

Criminal prosecution on bill of indictment purporting to charge a violation of the provisions of G.S. 113-170.

The defendants were tried under a bill of indictment which charges that they "unlawfully, wilfully did take fish with the use of dynamite and explosives . . ." It is agreed that the indictment purports to charge the offense created by and defined in G.S. 113-170 which is as follows:

"It shall be unlawful to place in any of the waters of this state any dynamite . . . or any explosive substance whatsoever . . . for the purpose of taking, killing or injuring fish."

There was a verdict of guilty. Thereupon the defendants moved that judgment be arrested for that the indictment does not charge any criminal offense. The motion was denied and defendants excepted. The court pronounced judgment from which defendants appealed.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Bowie & Bowie for defendant appellants.

BARNHILL, J. The defendants, on their appeal here, rely solely upon their exception to the ruling of the court below denying their motion in arrest of judgment. The motion was well advised and must be sustained.

It is a universal rule that no indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all of the constituent elements of the offense sought to be charged. *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

"An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the bill must either charge the offense in the language of the act, or specifically set forth the facts constituting the same." *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, and cases cited.

The bill need not be in the exact language of the statute, but it must contain averments of all the essential elements of the crime created by the act. "The breach of a statutory offense must be so laid in the indictment as to bring the case within the description given in the statute and inform the accused of the elements of the offense." *S. v. Ballangee,* 191 N.C. 700, 132 S.E. 795. "Nothing can be taken by intendment." *S. v. Jackson, supra; S. v. Liles,* 78 N.C. 496.

When a specific intent is a constituent element of the crime, it must be alleged in the indictment. The omission of such allegation is fatal. *S. v. Morgan, supra.*

A comparison of the alleged offense charged in the bill of indictment with the crime created by the act under which it was drawn compels the conclusion that the bill is fatally defective. The offense created by the statute is (1) the placing of dynamite etc. in any of the waters of this State (2) for the purpose of taking, killing, or injuring fish. Neither the act condemned nor the intent specified is alleged. This defect goes to the substance and not to the form of the indictment. *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; G.S. 15-153.

As the bill of indictment under which defendants were tried and convicted is fatally defective, it will not serve to bar further prosecution if the solicitor is so advised. *S. v. Morgan, supra.*

The judgment herein must be arrested. It is so ordered.

Reversed.

EDWARD D. HOWARD v. FRED BINGHAM AND HAL BINGHAM, TRADING AS BINGHAM LUMBER COMPANY.

(Filed 3 February, 1950.)

1. Negligence § 19c—

While contributory negligence is an affirmative defense upon which defendant has the burden of proof, nonsuit on the ground of contributory negligence is properly entered when plaintiff's own evidence establishes

contributory negligence as the sole reasonable inference that can be drawn therefrom.

2. Automobiles § 18h (3)—Evidence held not to show contributory negligence as matter of law in attempting to pass truck before reaching intersection.

Plaintiff's evidence tended to show that he was following a truck on the highway, that as the truck cleared a curve and entered a 500 yard straightaway, plaintiff sounded his horn and undertook to pass the truck some 275 feet before reaching an intersection with a dirt road, that when within 75 feet of the intersection, just as plaintiff, traveling 40 miles per hour, had reached the back of the truck, the truck, traveling 20 miles per hour, suddenly, without previous warning from the driver, turned to the left into plaintiff's lane of travel, causing the injury in suit. *Held:* Nonsuit on the ground that plaintiff was contributorily negligent in attempting to pass at an intersection, G.S. 20-150 (c), was properly denied, since the evidence is susceptible to the inference that plaintiff could have passed the truck before it reached the intersection had not the driver of the truck turned suddenly to the left 75 feet from the intersection in "cutting the corner."

APPEAL by defendants from *Sink, J.*, at September Term, 1949, of FORSYTH. No error.

This was an action to recover damages for injury to plaintiff's automobile resulting from collision with defendants' truck.

Issues of negligence, contributory negligence and damage were submitted to the jury and answered in favor of plaintiff. From judgment on the verdict defendants appealed.

Deal & Hutchins for plaintiff, appellee.

Womble, Carlyle, Martin & Sandridge for defendants, appellants.

DEVIN, J. The only error assigned in defendants' appeal was the denial of their motion for judgment of nonsuit, and the only ground upon which it was argued that this motion should have been sustained was that on plaintiff's testimony the injury to his automobile proximately resulted from his own contributory negligence.

While contributory negligence is an affirmative defense and within the rule that ordinarily nonsuit will not be allowed in favor of the party upon whom rests the burden of proof (*Sims v. Lindsay,* 122 N.C. 678, 30 S.E. 19), the principle is well settled that when the plaintiff's own testimony establishes contributory negligence as a matter of law nonsuit should be allowed. *Elder v. R. R.,* 194 N.C. 617, 140 S.E. 298; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623; *Brown v. Bus Lines,* 230 N.C. 493, 53 S.E. 2d 539; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Fawley v. Bobo, ante,* 203, 56 S.E. 2d 419. But it has been frequently declared by this Court

that nonsuit on the ground of contributory negligence should be allowed only when the plaintiff's evidence so clearly establishes such negligence that no other reasonable inference can be drawn therefrom. *Bailey v. Michael, ante,* 404; *Dawson v. Transportation Co.,* 230 N.C. 36, 51 S.E. 2d 921; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 121; *Cummins v. Fruit Co.,* 225 N.C. 625, 36 S.E. 2d 11; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637. "It is only when plaintiff proves himself out of court that nonsuit may be entered on the issue of contributory negligence." *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793.

In order to determine the propriety of the ruling below to which appellants have noted exception, we have examined the evidence shown by the record before us, and find the material facts according to plaintiff's testimony were these: On 8 January, 1948, between 8 and 9 a.m. plaintiff was driving his automobile on the paved highway from Clemmons to Winston-Salem, and was following immediately behind defendants' large truck loaded with lumber which was proceeding in the same direction around a curve in the road. The truck was being driven at about 20 miles per hour. Some 275 or 280 feet beyond the end of the curve was an unpaved side road leading to the left. The paved highway extended straight for 500 yards or more. There was no other traffic in sight. Reaching the end of this curve, with his view unobstructed, plaintiff sounded his horn and undertook to pass, traveling at the rate of 40 miles per hour. The driver of defendants' truck, however, when 75 feet from the intersecting side road, without previous signal, drove the truck to the left into plaintiff's lane of travel, in front of plaintiff's automobile. The only signal given was by the truck driver's hand just as plaintiff's front wheels were even with the truck's rear wheels. Plaintiff immediately applied his brakes and pulled to his left as far as he could without going down an embankment. Plaintiff testified the truck "just pulled right straight across the road in front of me and cut the corner of the intersection . . . I either had to hit him or go down the embankment, so my right front wheel hit his rear wheel." The collision occurred about where the side road enters the highway. Tire marks of plaintiff's automobile on the pavement were visible for a distance of 78 feet back from the place of collision. Plaintiff's automobile was injured. The truck was unharmed.

Defendants contend that plaintiff violated G.S. 20-150 (c) by attempting to pass a vehicle proceeding in the same direction at an intersection, and that the violation of this statute constituted negligence barring recovery, citing *Cole v. Lumber Co.,* 230 N.C. 616, 55 S.E. 2d 86. However, in that case, as the basis for the decision affirming the nonsuit, it was said the collision "occurred when the automobile attempted to

overtake and pass the truck at the intersection of a side road into which the truck was turning." Here the plaintiff, after signaling his intention so to do, had turned his automobile into the left traffic lane for the purpose of passing when he was 275 feet from the side road, and was driving at a speed twice that of the truck. From his point of view the factors of comparative speed and distance were such as to afford reasonable ground for the assumption that he could pass in safety before the truck reached the intersection, and the inference is permissible that but for the unexpected action of the driver of the truck in suddenly turning to the left in front of plaintiff's automobile 75 feet from the intersection, the collision would not have occurred. *Williams v. Express Lines,* 198 N.C. 193, 151 S.E. 197.

What is the proximate cause of an injury is ordinarily a question for the jury. It is to be determined as a fact from the attendant circumstances. *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740; *Nichols v. Goldston,* 228 N.C. 514, 46 S.E. 2d 320. Conflicting inferences of causation arising from the evidence carry the case to the jury.

We conclude that plaintiff's evidence was sufficient to withstand a motion to nonsuit, and that defendants' motion was properly denied.

In the trial we find

No error.

EPHRIAM M. GRAY ET AL. v. DUKE POWER CO.

(Filed 3 February 1950.)

Appeal and Error § 31b—

Where a verdict might well have been directed for appellee upon an issue answered by the jury in its favor, any errors in the trial of the issue are perforce harmless.

ERVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Rousseau, J.,* July Term, 1949, of McDOWELL.

Petition for partition.

The petitioners claim one-half undivided interest in an 80-acre tract of land situate on the waters of the Catawba River in McDowell County above the dam and hydroelectric power plant of the Duke Power Company.

The respondent, Duke Power Company, denied that it was a tenant in common with the petitioners, and pleaded sole seizin, first, by virtue of

superior title deeds, and, secondly, by adverse possession for more than twenty years.

The controversy was submitted to the jury on the following issues:

"1. Did the petitioners, E. M. Gray, O. E. McFarland, Lillie Adams, Albert Branch, Martha G. Dobson, Etta G. Edwards, Pless Gray, James C. Gray, Marie Jaynes, Dorothy T. Teague, and the respondent J. H. Gray acquire and become the owners of a one-half undivided interest, as tenants in common in the lands described in the petition, as heirs at law of W. R. Gray, deceased, with the respondent Duke Power Company or its predecessor in title? Answer: Yes.

"2. Have the respondent Duke Power Company and its predecessors in title acquired title in fee simple to said one-half undivided interest by adverse possession, as alleged in the answer? Answer: Yes."

There was a directed verdict for the petitioners on the first issue, and the jury answered the second issue in favor of the respondent, Duke Power Company, after a warmly contested trial.

From judgment on the verdict, the petitioners appeal, assigning numerous errors on the trial of the second issue.

William C. Chambers and William J. Cocke for petitioners, appellants.

W. S. O'B. Robinson, W. B. McGuire, Jr., and Proctor & Dameron for respondent, Duke Power Co., appellee.

STACY, C. J. A careful perusal of the record leaves us with the impression that as the trial court might well have directed a verdict for the respondent, Duke Power Company, on the second issue, any errors committed on the trial of this issue are perforce harmless.

Nevertheless, an examination of the record reveals that no new or novel question of law is presented by any of the exceptions, and that they fall well within the decided cases on the subject. It would only be threshing over old straw to consider them *seriatim* or in detail. The issue was one of fact determinable alone by the jury.

We are constrained to uphold the validity of the trial on the record as presented.

No error.

ERVIN, J., took no part in the consideration or decision of this case.

MRS. W. H. ELLIOTT, CLIFTON ELLIOTT AND WIFE, VIVIAN ELLIOTT; J. K. ELLIOTT AND WIFE, NANNIE BELLE ELLIOTT; EUSTACE ELLIOTT AND WIFE, PAULINE ELLIOTT; JASPER ELLIOTT AND WIFE, CLARA BELLE ELLIOTT; LILLIE MAE ATKINS AND HUSBAND, HOMER ATKINS; EMMA RAY AND HUSBAND, HENRY RAY; AND NELLIE DAVIS AND HUSBAND, HERMAN DAVIS, v. SWARTZ INDUSTRIES, INC.

(Filed 3 February, 1950.)

1. Injunctions § 6: Appeal and Error § 14—

Defendant's appeal from the denial of a motion for continuance does not deprive a court of equity from entering a temporary order in the cause restraining the maintenance of a nuisance.

2. Trial § 4—

Defendant's motion for a continuance on the ground that it had moved to strike certain allegations of the complaint as a matter of right and intended to demur to the complaint, but could not do so until the complaint was in final form, is illogical, since if the striking of the allegations is necessary to render the complaint demurrable, the deletion of such matter would be improper.

3. Same—

A motion for continuance is addressed to the discretion of the trial court.

4. Injunctions § 6—

The granting of a temporary order restraining the maintenance of a nuisance until the hearing is within the discretion of the trial court.

5. Appeal and Error § 40b—

Appeals from discretionary orders of the trial court will be dismissed in the absence of abuse of discretion.

DEFENDANT'S appeal from *Burney, J.*, in Chambers August 31, 1949, DURHAM Superior Court.

Victor S. Bryant and Robert I. Lipton for defendant, appellant.

Fuller, Reade, Umstead & Fuller, James R. Patton, Jr., James L. Newsom, and John E. Markham for plaintiffs, appellees.

PER CURIAM. The plaintiffs brought this action to restrain the defendant from maintaining a nuisance from which they allege they sustained a special damage or injury to their health and discomfort in enjoyment of their home. The nuisance complained of was the operation of a rendering and processing plant in which dismembered portions of animals in various stages of decomposition and putrefaction were steamed in a cooker or digester, thereby causing the fats to collect or rise to the top, the "greaves" falling to the bottom and oils and by-products thus

recovered. It is alleged that "offensive, foul, sickening, and noxious odors, gases, and vapors are emitted to such extent that they infiltrate and contaminate the atmosphere for a distance of one or two miles," and that by reason thereof the plaintiffs are forced to inhale the offensive odors to their great damage.

After the filing of plaintiffs' complaint the defendant, as it contends as a matter of right, moved to strike out certain portions of the complaint as irrelevant and prejudicial. While this motion was pending the defendant was served with an order to show cause why a temporary restraining order should not issue against it to continue to the hearing on the merits.

At the time and place set for a hearing of the order to show cause the defendant moved for a continuance, stating as a ground therefor that defendant intended to demur to the complaint on the ground that it failed to state a cause of action entitling the plaintiff to equitable relief, and this could not be done until the complaint was in final form.

The motion for continuance was overruled and defendant appealed. The court thereupon proceeded to hear the order to show cause upon the evidence introduced, and made an order restraining the defendant from the continued operation of the plant so as "to emit foul, sickening, noxious and offensive odors until a final determination of this cause." The defendant excepted to the signing of the order and gave notice of appeal.

The defendant contends that the appeal from denial of his motion for continuance took the case out of the jurisdiction of the court, and that subsequent orders therein were *coram non judice* and should be so declared by this Court. With this the Court cannot agree.

The want of logical connection between defendant's motion to strike and the motion to continue the case seems to be apparent. If it was necessary to trim down the complaint in order to support the demurrer to the cause of action contained in it, the deletion of such matter would have been improper.

The continuance of the case was within the discretion of the court,—and so also was the temporary restraining order giving relief from the condition complained of until the hearing: McIntosh, Practice and Procedure, p. 801; *Sykes v. Blakey,* 215 N.C. 61, 200 S.E. 2d 910; *Dunn v. Marks,* 141 N.C. 232, 53 S.E. 845; *S. v. Dewey,* 139 N.C. 556, 51 S.E. 937; *Green v. Griffin,* 95 N.C. 50; *Carleton v. Byers,* 71 N.C. 331; *Johnson v. Life Ins. Co.,* 215 N.C. 120, 1 S.E. 2d 381; and there was no abuse of that discretion in either phase of the matter. "Abuse of discretion is more apt to be shown in granting a continuance, and in the dilatory administration of justice." *S. v. Sultan,* 142 N.C. 569, 54 S.E.

841. And from *Green v. Griffin,* 95 N.C. 50, 52, we find applicable precedent:

> "The defendant insists that the appeal, when perfected, annulled the order for all purposes, and left the parties against whom it was directed as free to act as before it was made. If this were so, it is manifest that the right to arrest the action of one, committing irreparable damages by a restraining order, could be easily defeated by taking an appeal, and consummating what was intended, before it could be acted upon in the higher Court. . . . The remedy sought by the process might thus become illusory, and success in the suit followed by no benefit to the aggrieved party."

The temporary restraining order does not prohibit any act except that which would be in any case a violation of legal duty.

The orders appealed from must be affirmed. The appeal is dismissed.

Appeal dismissed.

CAROL POWELL v. J. H. INGRAM, JR., BERNARD CARROLL AND WILLIS V. SANDERS;

and

CHARLES STANCELL v. J. H. INGRAM, JR., BERNARD CARROLL AND WILLIS V. SANDERS.

(Filed 2 February, 1950.)

Torts § 5: Judgments § 32—

Where plaintiffs seek no relief from a party joined as a defendant by the original defendants for the purpose of contribution under G.S. 1-240, the liability of such defendant to plaintiffs is not at issue on the trial, and judgment for the original defendants does not preclude plaintiffs from later suing the party so joined.

APPEAL by plaintiffs from *Nimocks, J.,* and a jury, at the May Term, 1949, of DURHAM.

The plaintiffs brought separate actions against Ingram and Carroll for damages for personal injuries suffered in a collision involving three motor vehicles, to wit: passenger automobiles driven by Ingram and Carroll, and a truck operated by Sanders. Upon application of Ingram and Carroll, Sanders was made a party defendant in each case for the purpose of contribution under G.S. 1-240. The plaintiffs sought no relief, however, as against Sanders. By consent of all parties, the two actions were consolidated for trial and judgment, and appropriate issues

were submitted to the jury, who found that the plaintiffs were not injured by actionable negligence on the part of Ingram and Carroll, or of either of them. Judgment was entered on the verdict exonerating Ingram and Carroll, and the plaintiffs excepted and appealed, assigning errors.

John T. Manning and Egbert L. Haywood for plaintiffs, appellants.

Spears & Hall for the defendant, John T. Ingram, Jr., appellee.

T. Lacy Williams and Fuller, Reade, Umstead & Fuller for defendant, Bernard Carroll, appellee.

PER CURIAM. A careful consideration of the record and case on appeal leaves us with the firm conviction that the trial in the court below conformed to all applicable legal principles. As no error in law appears, the verdict and judgment must be upheld. The question of the liability of Sanders to the plaintiffs was not at issue on the trial, and in consequence the judgment does not preclude the plaintiffs from suing Sanders in case they desire to do so.

No error.

L. C. BROTHERS, JR., v. BELL BAKERIES, INC., AND E. L. RIGSBEE.

(Filed 3 February, 1950.)

Abatement and Revival § 9—

The pendency of an action involving the respective liabilities of three parties to a collision *inter se*, precludes a subsequent action by one of defendants therein against the other two parties based on the same collision, and the second action is properly abated upon answer alleging the facts.

APPEAL by plaintiff from *Burney, J.*, at October Term, 1949, of GRANVILLE.

Civil action to recover for personal injuries and property damage, which the plaintiff alleges he sustained as a result of the negligence of the defendants.

1. The negligence complained of, the plaintiff alleges, caused a collision on 6 August, 1948, on U. S. Highway No. 15, in Granville County, between a motor vehicle operated by the plaintiff, L. C. Brothers, Jr., and a motor vehicle owned by the defendant, Bell Bakeries, Inc., in the possession and under the control of one of its employees.

2. According to plaintiff's complaint, the motor vehicle of the defendant, Bell Bakeries, Inc., and a motor vehicle owned and operated at the

time by E. L. Rigsbee, were stopped or parked near each other, headed in opposite directions, on the aforesaid highway, so as to block the paved portion thereof.

3. The plaintiff, according to the allegations in his complaint, ran his car into the rear of the motor vehicle of Bell Bakeries, Inc., sustaining substantial injuries and damage.

4. On 29 September, 1948, Bell Bakeries, Inc., instituted an action in the Superior Court of Wake County, entitled "Bell Bakeries, Inc. *v.* L. C. Brothers," seeking to recover for its alleged property damage resulting from the above collision. In this action the defendant, L. C. Brothers (the plaintiff herein), filed an answer in which he denied liability and impleaded E. L. Rigsbee, alleging that if he, Brothers, was negligent, Rigsbee was also negligent, and that Rigsbee should be made a codefendant with Brothers, so that Brothers might have the benefit of contribution from Rigsbee in case of any recovery by the plaintiff, Bell Bakeries, Inc. Accordingly, E. L. Rigsbee was made a party defendant, and served with summons on 14 February, 1949.

5. The plaintiff herein instituted this action in Granville County, on 4 April, 1949.

6. The Bell Bakeries, Inc., filed an answer and pleaded the prior pending action in Wake County as a bar to the right of the plaintiff to maintain this action. In support of its plea and motion to dismiss, when the matter came on for hearing, it offered certified copies of the summonses, pleadings and the various motions and orders on file in the action pending between the parties in Wake County.

The motion was allowed and the action abated and dismissed as to Bell Bakeries, Inc.

Plaintiff appeals and assigns error.

Royster & Royster for plaintiff.

Bickett & Banks for defendants.

PER CURIAM. The ruling of the court below is in accord with the recent decision of this Court in the case of *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892, and the authorities cited therein.

The judgment entered below is

Affirmed.

ELBERT HERRING v. QUEEN CITY COACH COMPANY, A CORPORATION.

(Filed 3 February, 1950.)

Venue § 1b—

The right of an administratrix in regard to motions for change of venue under G.S. 1-78 may not be invoked by another party to the action.

APPEAL by defendant from *Shuford, Special Judge,* at 15 June, 1949, Term of DURHAM.

Civil action instituted in Superior Court of Durham County, North Carolina, by plaintiff, a resident of said county, to recover of defendant for personal injury and property damage sustained as proximate result of negligence of defendant, in a collision between defendant's bus, operated by its agent in the course of its business, and in which plaintiff was a passenger, and an automobile operated by one Paul Spivey.

Defendant moved for removal of the action from the Superior Court of Durham County to, and for trial in the Superior Court of Wake County, as a matter of right, on the ground that Paul Spivey, a resident of Wake County, is dead, and Mabel Spivey has been appointed administratrix of the estate of Paul Spivey by Clerk of Superior Court of Wake County, and is a necessary and proper party to this action, in that the collision in which plaintiff was injured was due to the actionable negligence of said Paul Spivey,—as averred in the further answer of defendant.

Defendant then filed answer, and moved that the said administratrix be made a party defendant.

The court ordered that the administratrix be made a party defendant, etc., but denied the motion for the removal of the action as aforesaid:

Defendant appeals to Supreme Court and assigns error.

Bell & Horton for plaintiff, appellee.

R. M. Gantt for defendant, appellant.

PER CURIAM. The right to the benefits of the provisions of G.S. 1-78, as to venue for "actions against executors and administrators in their official capacity" would seem to rest with the executor or administrator as the case may be. Such right does not exist as to third parties. Hence, the court properly denied defendant's motion for the removal of the action.

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1950

HART COTTON MILLS, INC., A CORPORATION, v. ELIZABETH ABRAMS AND 159 OTHER INDIVIDUALS AND TEXTILE WORKERS UNION OF AMERICA, CIO, AN UNINCORPORATED ASSOCIATION, AND R. H. HARRIS, HOWARD PARKER, TED THOMAS, CHARLIE STANCIL, HENRY BYRD, MELVIN HOARD, J. C. HUGHES AND SYLVESTER SAWYER IN THEIR CAPACITIES AS REPRESENTATIVES AND OFFICIALS OF TEXTILE WORKERS UNION OF AMERICA, CIO.

(Filed 1 March, 1950.)

1. Contempt of Court § 2b—

Where a temporary restraining order enjoins defendants and all others with notice from doing certain prescribed acts, each person who willfully and intentionally violates the order after actual notice of its existence and contents, is guilty of contempt, notwithstanding that he may not have been formally served with the order.

2. Contempt of Court § 5—Evidence held sufficient to support findings of fact by the court in this contempt proceeding.

In this contempt proceeding based upon the violation of an order relating to picketing at plaintiff's mill, there was evidence that respondents were defendants in the action in which the order was issued, that they were apprised of the existence and contents of the order by advertisement in the local newspaper, by the posting of the order at the mill gate at which the violation occurred, and by the act of the sheriff in reading the order and directing them to move away from the proscribed area, and that after being so advised, respondents refused to disperse and persisted in the violation of the order by remaining in the proscribed area, completely blocking access to the mill, until after the time when workers were scheduled to report at the mill. *Held:* The evidence was sufficient to sustain

the court's findings to the effect that respondents violated the order and did so after having been apprised of its existence and contents, notwithstanding their contention that they had not been formally served with the order and that the confusion was brought about by lack of information as to its contents.

3. Same—

Where respondents are charged with concerted action in furtherance of a common purpose to violate a restraining order relating to picketing at plaintiff's mill, the booing or singing of members of the crowd, conveying a defiant intention to persist in the violation of the order after its terms had been read to them and they had been directed to disperse by the sheriff, *is held* competent against each respondent regardless of whether he personally participated in the booing or singing.

4. Same—

Where respondents are charged with concerted action in furtherance of a common purpose to violate an order enjoining picketing in a proscribed manner, a statement made by one of their leaders, and booing and singing by members of the crowd, conveying a defiant intention to persist in the violation of the order after being apprised of its terms, *is held* competent as a part of the *res gestæ* and to show the *quo animo* of the group.

5. Same: Evidence § 30b—

A witness may use a photograph or map or chart or diagram for the purpose of illustrating his testimony.

6. Contempt of Court § 2b—

Where it is found upon supporting evidence that each of respondents willfully and intentionally violated the terms of a restraining order, their oaths that their acts were not done with the motive of showing disrespect or contempt for the court will not purge them of the contempt.

7. Same—

The burden is upon respondents to show facts sufficient for the purpose of purging them of contempt when relied upon by them.

8. Same—

Where there is not sufficient evidence to show that one of respondents in contempt proceedings had actual notice of the terms of the order he is charged with violating, he will be discharged.

APPEAL by respondents from *Carr, J.*, in Chambers at Tarboro, N. C., 26-28 September, 1949, EDGECOMBE.

Action in equity for injunctive relief, heard on citation to show cause why the respondents should not be adjudged in contempt.

The employees of plaintiff Hart Cotton Mills, Inc., of Tarboro, N. C., went out on strike 12 May 1949. On 4 August 1949, plaintiff instituted this action to restrain and enjoin the defendants from certain alleged wrongful and unlawful acts in the manner and method of picketing the

mill. An order to show cause was issued by Bone, J., against the defendants herein.

After hearing on the rule to show cause, Bone, J., on 12 September, issued a temporary restraining order as follows:

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants, and each of them, and all other persons to whom notice or knowledge of this order may come, until the merits of this cause are determined and until this Court orders otherwise, are hereby enjoined and restrained as follows:

"Within 150 yards of the fence surrounding the plaintiff's premises, no person or persons shall loiter or congregate or do any picketing, by standing, sitting, marching or otherwise, for the purpose of preventing other persons from working in the plaintiff's plant or doing business with the plaintiff, except as follows:

"At any one time no more than 25 persons may peaceably picket within each of the areas defined and circumscribed as follows: Commencing ten feet from the post on either side of any gate in the fence around the plaintiff's premises and extending away from that gate and six feet in width from the fence, and parallel with the fence, to a point ten feet from the next gate post.

". . .

"No person or persons shall interfere in any manner with the free ingress and egress of any other person whomsoever to and from the plaintiff's premises.

". . .

"The things which persons are hereby enjoined and restrained from doing, they, and each of them, are likewise enjoined and restrained from aiding or procuring or causing them to be done.

"This order shall become effective upon the plaintiff's filing with the Clerk of the Superior Court of Edgecombe County a written undertaking with sufficient sureties, justified before and approved by the said Clerk, in the amount of ONE THOUSAND DOLLARS guaranteeing to the amount specified that the plaintiff will pay to the defendants such damages as the defendants may sustain by reason of the issuance of this order, in the event it is finally determined that the same should not have been issued.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Sheriff of Edgecombe County shall post copies of this order in conspicuous places at and in the vicinity of the plaintiff's plant."

This order was served 13 September in the manner set forth in the court's finding of fact in its judgment on the rule to show cause.

The mill planned to open on the morning of the 14th. The time for the morning shift to enter the mill grounds was from 6:30 to 7:00 a.m. The main entrance gate is on St. James Street and is about twenty-five

feet wide. On the morning of the 14th from 100 to 125 employees, including most of the respondents, gathered at the main gate prior to 6:30 and aligned themselves in and across the gate entrance in a solid mass from five to eight deep, completely closing or shutting off the entrance, where they remained until about 7:15. About 6:15 or 6:30 the sheriff of the county appeared at the gate. At about 6:40 he requested the attention of the group at the gate, and read to them the adjudication portion of the restraining order above quoted. He then told them that they were then violating the order and directed or requested them to move. The group in response began to boo and then sang: "We shall not be moved. We are like a tree planted by the river." They did not leave but continued to block the gate for at least thirty minutes and until after the time for the morning shift to enter the mill. The respondents named in the court's judgment were members of the group blocking the gate and none of them except R. H. Harris and Dempsey Gurkins left when requested by the sheriff.

R. C. Thomas was in charge of the picketing and directed the picketers where to go and what to do. He stated they were not going to let anyone enter the mill that morning.

On 15 September the plaintiff filed a motion, supported by affidavit, that the court cite 74 of the defendants, including the appellants, to appear and show cause why they and each of them should not be adjudged in contempt.

Burney, J., issued the citation returnable before Carr, judge presiding, at Tarboro, N. C., 21 September. The respondents filed answer in which they profess their respect for the court and deny any intent to disobey or disregard its orders. Ellis Worrell, Jr. filed affidavit denying he was present and was by consent discharged. Lester Matthews also filed affidavit by way of answer in which he asserted he was at the small back gate of the plant on the morning of the 14th and never went to the main or St. James Street entrance.

The hearing was continued to 26 September on which date Carr, J., after hearing the evidence and arguments of counsel, which extended to 28 September, entered his findings of fact and judgment as follows:

"This cause coming on to be heard upon the plaintiff's petition that the persons named below be adjudged in contempt of this court, and the court having heard and considered the evidence which appears of record, and the court finding:

"1. That on or about September 12, 1949, by virtue of proceedings theretofore had in this cause as appear of record, Hon. Walter J. Bone issued an injunction or restraining order as appears of record herein; that on September 13, 1949 the Sheriff of Edgecombe County, North Carolina, posted copies of said order in the immediate vicinity of the

main entrance gate to the plaintiff's premises; that on the same date the principal enjoining and restraining provisions of said order were prominently printed in a newspaper which is published and distributed each day in the Town of Tarboro, North Carolina; that said issue of said newspaper also contained a full page advertisement in which the plaintiff called public attention to the issuance of the aforesaid order.

"2. That on the morning of September 14, 1949, commencing at approximately 6:30 A.M., a large crowd of persons massed themselves in and in front of the main entrance gate to the plaintiff's plant, said entrance gate being located on St. James Street in the Town of Tarboro, North Carolina; that at approximately 6:40 A.M. the Sheriff of Edgecombe County placed himself in front of the said crowd of people, stated to them that he held in his hand copy of a court restraining order and that he would read the same to them; that he then proceeded to read to the crowd all of the aforesaid order issued by Hon. Walter J. Bone, commencing with the words thereof, 'Now, Therefore, It is Hereby Ordered, Adjudged and Decreed:' that after completing the reading of the said order the said Sheriff of Edgecombe County informed and announced to the aforesaid crowd of people that they were in violation of the said order and asked and demanded of said crowd that they move away; that thereupon large numbers of people in the said crowd set up a loud 'booing'; that thereafter large numbers of people in the said crowd commenced to sing and did sing a song, the chief refrain of which was in the words, 'We Shall Not Be Moved'; that substantially the entire crowd of people did continue and remain standing massed as they theretofore had been in and in front of the entrance gate to the plaintiff's plant from approximately 6:30 A.M. until approximately 7:15 A.M., at which latter time the crowd of people began to disperse, this being approximately 30 minutes after the reading of the aforesaid order by the aforesaid Sheriff, and being approximately 15 minutes after the regular morning time for commencing work in the plaintiff's plant.

"3. That the Sheriff of Edgecombe County delivered a certified copy of said restraining order on the late afternoon of Tuesday, September 13th, to the defendant, R. C. 'Ted' Thomas, in person; that the said Thomas had theretofore acted as a leader or manager of picketing at the aforesaid entrance gate; that on the morning of September 14th, after some officers had arrived at the main entrance gate where a crowd was assembled as hereinbefore set out in Finding of Fact No. 2, and before the Sheriff had read parts of the restraining order to the crowd as set out in said Finding of Fact No. 2, the defendant, R. C. 'Ted' Thomas, while standing in said crowd stated in a voice that could be heard by officers at the scene, 'Nobody comes in here today.'

"4. That all of the persons named below were present in the aforesaid crowd of people from approximately 6:30 A.M. to 7:15 A.M.; that all of the persons named below while present in said crowd were standing in the immediate vicinity of the aforesaid entrance gates and in an area between the areas permitted for picketing by the aforesaid order and were thus standing massed in an area not permitted for picketing by the said order, the area in which they were thus standing consisting principally of the space in and in front of the aforesaid entrance; that all of the persons named below were part of a crowd of people who from approximately 6:30 A.M. to 7:15 A.M. did physically block the aforesaid entrance to the plaintiff's plant.

"5. That all of the persons named below on the morning of September 14, 1949, did intentionally and wilfully congregate and picket in mass within 150 yards of the fence surrounding the plaintiff's premises, in numbers exceeding 25 and not within the areas permitted by the said order, and more particularly in and in front of the aforesaid main entrance gate to the plaintiff's plant, for the purpose of preventing other persons from working in the said plant, and by such congregating and mass picketing did intentionally and wilfully interfere with, block and prevent free ingress into the said plant; that while said persons were congregating and picketing in and in front of the aforesaid main entrance gate to the plaintiff's plant, no person was seen undertaking during that time to enter and go through said main entrance gate into the plaintiff's plant.

"6. That no copy of said restraining order was ever served upon any of the persons named below with the exception of the defendant R. C. 'Ted' Thomas.

"7. That the persons hereinbefore referred to as being the persons named below are as follows: Jessie Beach, Frank Baker, Henry Bird, Mrs. Helen Beach, Nellie Carter Bass, Cora Brumbles, David Brock, Mae Crank, Fred Carlisle, Walter Driver, James Dunn, Joe Edmondson, Mrs. Grace Edmondson, Amos Ezzell, Alice Edmondson, Florence Gurkins, John H. Ford, Jimmie Harrington, A. C. Highes, Mrs. Pennie Hughes, Haywood Holland, Elizabeth Hogan, Mrs. Lillian Joyner, Mildred Gurkins Knowles, Thurman Lassiter, Mrs. Thurman Lassiter, John Lawhorn, Mrs. Rosa Long, Ethel Lawhorn, Luther Mitchell, Roy Modlin, Mrs. Ina Martin, Lester Matthews, James Overton, Margaret Phillips, Junior Phillips, Roy Pigg, Mrs. Reba Pigg, Charlie Stancil, Robert Stokes, Richard Staton, Mrs. Cora Lee Stokes, Mrs. Hattie Terry, Louis Twiddy, Ottis Taylor, R. C. Thomas, Eugene Umphlett, Richard Wilson, Clarence Whitley, George Williamson, J. R. Whitley, Mattie Wagner, Ebert Wilson.

"8. That the persons named in paragraph 7 above and each of them did in the manner and under the circumstances hereinabove set forth

intentionally and wilfully violate the aforesaid injunction and restraining order issued by the court in this cause.

"Now, Therefore, the Court does hereby find, conclude, order and decree that the persons named in paragraph 7 above and each of them are adjudged in contempt of this Court.

"It is further ordered, adjudged and decreed that the said persons and each of them be punished for their said contempt as follows:

"That the defendant R. C. 'Ted' Thomas be confined to jail in Edgecombe County for a term of thirty days, Execution of this jail sentence is suspended on condition that said defendant pay into the office of the Clerk of the Superior Court of Edgecombe County a fine of $250.00, and that the said defendant refrain and desist from any further violation of the restraining order referred to in this proceeding entered by his Honor, Walter J. Bone, Judge, on the 12th of September 1949, so long as said restraining order remains in force and effect.

"That as to the minor defendants named in this cause, to-wit: Grady Junior Phillips, by and through his Guardian *ad Litem* Lester Matthews, and Ebert Wilson, by and through his Guardian *ad Litem* Richard A. Wilson, it is ordered that prayer for judgment in this proceeding as to each of said defendants be continued upon condition that each of said defendants refrain and desist from any further violation of the aforesaid restraining order so long as the said restraining order is in force and effect.

"That as to each of the other defendants named in Paragraph 7 with the exception of the defendant R. C. 'Ted' Thomas, Grady Junior Phillips, by his Guardian *ad Litem* Margaret Phillips, Elizabeth Hagan, by her Guardian *ad Litem* Lester Matthews, and Ebert Wilson, by his Guardian *ad Litem* Richard A. Wilson, it is ordered that said defendants and each of them pay into the office of the Clerk of the Superior Court of Edgecombe County a fine of $50.00.

"Each of the defendants named in paragraph 7, with the exception of the minor defendants, Grady Junior Phillips, Elizabeth Hagan, and Ebert Wilson, is taxed with his or her pro rata part of the cost of this contempt proceedings, and as to the remaining cost of the contempt proceedings it is ordered that the plaintiff be taxed with said remaining cost.

"This 28th day of September 1949."

Respondents not named in paragraph 7 of the findings of fact were discharged. Those named therein excepted and appealed.

Pierce & Blakeney and Henry C. Bourne for plaintiff appellee.

Robert S. Cahoon for respondent appellants.

BARNHILL, J. While the evidence consumes less than forty pages of the record, there are 243 assignments of error. However, many of them are not brought forward and discussed in the brief of appellants. Those that are preserved present four questions for consideration and decision: (1) Are the facts found by the court sufficient to support the judgment, and if so, (2) is there competent evidence sufficient to support the findings; (3) did the court admit incompetent evidence to the prejudice of the respondents; and (4) have the respondents purged themselves of any contempt on their part?

A mere reading of the findings of fact answers the first question. It was not necessary that the order be formally served on each of the respondents. Actual notice of its existence and contents was sufficient. *Lodge v. Gibbs,* 159 N.C. 66, 74 S.E. 743; *Wilson v. Bryan,* 195 N.C. 360, 142 S.E. 491; High, Injunctions, 4th Ed., sec. 1422.

The mandate of the court was operative as against all parties having notice thereof from the time it was issued. To fix the liability of respondents for a violation of its terms, it was only necessary to show that they were actually apprised of its existence at the time they committed the acts alleged. *Lodge v. Gibbs, supra;* High, Injunctions, sec. 1421.

There is substantial evidence in the record in support of each finding of fact made by the judge. The appellants and others were gathered *en masse* in the area prohibited by the restraining order. They were defendants in the action and knew a restraining order had been applied for and might be issued. They were advised of the order and its contents and were told they were violating its terms. Upon being requested to leave, they held their ground and declined to disperse. Instead they greeted the request of the officer with boos. They then sang a good hymn for the inappropriate purpose of conveying a defiant intention to remain where they were.

Indeed, none of the appellants, other than Lester Matthews and Clarence Whitley, denied that they were present at the main gate in a group which completely blocked the entrance. Nor do they deny notice of the injunction or challenge the evidence as to the conduct of the group at the time. They merely deny that they engaged in mass picketing in the prohibited area on the morning of 14 September for the purpose of preventing other persons from working in said plant or intentionally prevented free ingress into the plant and aver "that whatever confusion or disturbance, or congregating, or related activity, which occurred on or about September 14, 1949, by any group of persons, defendants, or otherwise, was to the best of our knowledge and belief caused by genuine confusion brought about by lack of information about what order, if any, this Court had issued, what the contents of any order were, what was

required of the defendants in this cause, and others." In addition to this they assert that the injunction has never been served upon them.

The appellants and others were acting in concert in furtherance of a common purpose. Each was a party to what the others did and said in the course of their conduct in violation of the court order. Those who did not boo or sing were present, participating in the mass blocking of the company gate. Hence the exceptions to the evidence as to what was done and said at the time are without merit. *Henderson-Snyder Co. v. Polk,* 149 N.C. 104; *Saunders v. Gilbert,* 156 N.C. 463, 72 S.E. 610; *S. v. Davis,* 177 N.C. 573, 98 S.E. 785; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *S. v. Ritter,* 199 N.C. 116, 154 S.E. 62. The testimony as to the statement made by Thomas and as to the booing and singing was competent also as a part of the *res gestæ* and to show the *quo animo* of the group. *Saunders v. Gilbert, supra; S. v. Davis, supra; S. v. Rumple,* 178 N.C. 717, 100 S.E. 622; *Manufacturing Co. v. Arnold,* 228 N.C. 375.

That a witness may use a photograph or map or chart or diagram to illustrate his testimony and make it more understandable to the jury is settled law in this jurisdiction. *S. v. Shepherd,* 220 N.C. 377, 17 S.E. 2d 469; *S. v. Holland,* 216 N.C. 610, 6 S.E. 2d 217; *S. v. Mays,* 225 N. C. 486, 35 S.E. 2d 494; *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824.

The oath of a contemner is no longer a bar to a prosecution for contempt. "The question is not whether the respondent intended to show his contempt for the court, but whether he intentionally did the acts which were a contempt of the court." *In re Fountain,* 182 N.C. 49, 108 S.E. 342, 18 A.L.R. 208; *In re Parker,* 177 N.C. 463, 99 S.E. 342; *Herring v. Pugh,* 126 N.C. 852; *In re Young,* 137 N.C. 552; *In re Gorham,* 129 N.C. 481.

"The violation of a judicial mandate stands upon different ground, and the only inquiry is, whether its requirements have been wilfully disregarded. If the act is intentional, and violates the order, the penalty is incurred, whether an indignity to the Court or a contempt of its authority, was or was not the motive for doing it." *Green v. Griffin,* 95 N.C. 50; *Nobles v. Roberson,* 212 N.C. 334.

The respondents having sought to purge themselves, the burden was on them to establish facts sufficient for that purpose.

While Lester Matthews denied he was present at the main gate at the time the sheriff appeared and read the injunction, there is positive evidence in the record that he was there in the group and remained until the crowd dispersed.

The plaintiff offered evidence tending to show that Clarence Whitley was at the office gate at the time, and it is conceded by plaintiff that he was inadvertently included in the judgment in lieu of Clarence White. As the court below concluded there was not sufficient evidence that those

at the office gate had actual notice of the injunction, Clarence Whitley will be discharged.

The other exceptions and assignments of error are without substantial merit. We find in them no cause for disturbing the judgment. Except as to Clarence Whitley, the judgment entered is

Affirmed.

HADLEY HORNER, FOR AND ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE CITY OF BURLINGTON, v. THE CHAMBER OF COMMERCE OF THE CITY OF BURLINGTON, INC., THE CITY OF BURLINGTON, AND JENNINGS M. BRYAN, H. L. GALLOWAY, J. O. BAYLIFF, AND C. W. BURKE.

(Filed 1 March, 1950.)

1. Pleadings § 15—

The complaint will be liberally construed upon demurrer, and the demurrer should be overruled if the complaint presents facts sufficient to constitute a cause of action or if such facts can be fairly gathered from it, however inartificially the pleading may be drawn.

2. Municipal Corporations §5—

A municipality is a creature of the State and has the powers prescribed by statute and those necessarily implied by law, and no other. G.S. 160-1.

3. Municipal Corporations § 41—

A municipality may not appropriate tax revenue unless the outlay is explicitly or implicitly authorized by a constitutional statute.

4. Same—

The power of a municipality to appropriate tax revenue must be measured by the same criterions as those governing its taxing power.

5. Same: Taxation § 38a—

In a suit by a taxpayer to recover in behalf of a municipality a challenged expenditure, an allegation in the complaint that the challenged expenditure was purported to have been made "under the provision of Chapter 158 of the General Statutes" does not constitute an averment that there was statutory authority for the expenditure, since the word "purported" means to profess outwardly or to pretend, and further, the averment is harmonious with other portions of the complaint alleging the expenditure was made as a contribution to the Chamber of Commerce of the city to be used in the untrammeled discretion of the Chamber of Commerce in furtherance of its ordinary activities.

6. Same—

No statute authorizes a city to use its tax revenues for the payment of expense incident to the ordinary activities of the Chamber of Commerce of the city. G.S. 158-1.

7. Appeal and Error § 40—

Courts will not pass on constitutional questions until the necessity for doing so has arisen.

8. Taxation § 6—

Tax revenues may not be used for the supply of individuals or private corporations, however benevolent they may be.

APPEAL by plaintiff from *Burney, J.*, at the August Term, 1949, of ALAMANCE.

For convenience of narration, the City of Burlington is called Burlington; the Chamber of Commerce of the City of Burlington, Incorporated, is designated as the Chamber of Commerce; and Jennings M. Bryan, H. L. Galloway, J. O. Bayliff, and C. W. Burke are characterized as the individual defendants.

The complaint alleges, in substance, that at the time specified in it, the plaintiff was, and still is, a taxpaying citizen and resident of Burlington, a municipality in Alamance County, North Carolina; that at such times the individual defendants constituted the controlling majority of the governing body of Burlington, and as such caused the municipality to take the actions set out in the complaint; and that at the times named in the complaint, the Chamber of Commerce was, and still is, a private corporation, having these corporate purposes: (1) The promotion of every plan for the advancement of the commercial, manufacturing, civic, and monetary interests of the community of Burlington and Alamance County, and the abatement of every grievance injuriously affecting such interests; (2) the establishment and application of uniform and equitable rates and usages of trade; (3) the collection and preservation of statistical information concerning the commerce, capital, production and growth of Burlington and Alamance County; (4) the speedy and economical settlement of differences among its members, without resort to litigation; (5) the assembling of a general meeting of the businessmen of Burlington in all emergencies wherein their rights or interests may be affected; and (6) the discussion of all questions affecting the interests, trade, or manufacturers of Burlington and Alamance County, and the pecuniary welfare of Burlington and Alamance County.

The complaint further alleges, in substance, that the plaintiff prosecutes the action in behalf of himself and all other citizens and taxpayers of Burlington to compel the individual defendants and the Chamber of Commerce to restore to the treasury of Burlington the sum of $2,000.00 representing tax revenues of Burlington, which the individual defendants as the majority controlling the governing body of Burlington had turned over to the Chamber of Commerce and which the Chamber of Commerce had expended; that Burlington is joined as a party defendant in the

action "to facilitate the disposition of any recovery from the other defendants and for the purpose of otherwise protecting" its interests; and that the sum of $2,000.00 constituted a part of the *ad valorem* taxes accruing to Burlington upon taxable property in the municipality during the fiscal year 1947, and was levied and collected for the ostensible purpose of covering an item in the budget estimate bearing this indefinite designation: "Publicity: Chamber of Commerce, $2,000.00." Paragraph eight of the complaint states that the $2,000.00 was delivered to the Chamber of Commerce by the municipality acting under the control of the individual defendants free from "any restrictions, conditions, or requirements" as to its use, and with intent on the part of the individual defendants that it should be used by the Chamber of Commerce in its "untrammeled discretion in furtherance of the ordinary . . . activities of said Chamber of Commerce"; and paragraph nine of the complaint asserts that the money was mingled with the general funds of the Chamber of Commerce "derived from numerous other sources," and was "used, *pro rata,* for all the expenses of said Chamber of Commerce."

The complaint further alleges by implication rather than by express averment that a majority of the qualified voters of Burlington had approved Chapter 158 of the General Statutes of North Carolina in an election held under G.S. 158-3 during 1925. Paragraph ten expressly avers that "the tax levy, the appropriation, and the expenditures, gifts and donations, above described, are and were purported to have been made under the provisions of Chapter 158 of the General Statutes of North Carolina"; and that "no legislative authority for said taxes, appropriations, expenditures, gifts and donations elsewhere exists"; and paragraph eleven expressly asserts that "the tax levy, appropriation, and expenditure, above described, . . . were unlawful, illegal, and unauthorized, were not for a necessary expense nor for a public purpose, and were made . . . with the intent and purpose to evade the law and Constitution of the State of North Carolina, and . . . said individual defendants abdicated their public trust . . . and did and performed acts which, if otherwise authorized, would constitute an unlawful delegation of their public powers, trusts, and authority to the said defendant Chamber of Commerce."

The complaint alleges, in conclusion, that the plaintiff made demand upon the Chamber of Commerce that it restore the $2,000.00 to the treasury of Burlington; that the Chamber of Commerce refused to do so; that plaintiff thereupon made demand on the governing body of Burlington that the municipality sue the individual defendants and the Chamber of Commerce for the recovery of said sum, and the municipality refused to bring such action; and that the plaintiff thereupon brought the instant action. The prayer of the complaint is that Burlington be awarded

judgment against the individual defendants and the Chamber of Commerce for the sum of $2,000.00 with interests and costs.

The defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. G.S. 1-127 (6). The court sustained the demurrer and entered judgment dismissing the action. The plaintiff excepted and appealed, assigning this ruling as error.

William R. Dalton, Jr., for plaintiff, appellant.

Cooper, Sanders & Holt and W. D. Madry for defendants, appellees.

ERVIN, J. The appeal presents the single question as to whether the complaint discloses any cause of action in favor of the plaintiff. Hence, it calls for the application of the established rule that "when the objection is made that the complaint fails to state a cause of action, a liberal construction will be placed upon the pleading, with a view to sustaining it; and if in any portion of the pleading, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will be sustained, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, and the complaint is not demurrable unless it is wholly insufficient." McIntosh: North Carolina Practice and Procedure in Civil Cases, section 443.

A municipality is a creature of the State. It has "the powers prescribed by statute, and those necessarily implied by law, and no other." G.S. 160-1. In consequence, a city or town cannot make a rightful outlay of its tax revenues unless the outlay is explicitly or implicitly authorized by a statute conforming to the Constitution. Moreover, the constitutional power to make appropriations of money out of the treasury of a municipality must be measured by the same criterions as those by which it is raised by taxation and put into such treasury. *Green v. Kitchen,* 229 N.C. 450, 50 S.E. 2d 545.

It is clear that the plaintiff undertakes to challenge the legality of the expenditure in suit on these alternative grounds: (1) That the outlay was not authorized by statute, and consequently was unlawful; and (2) that it was not for a public purpose within the meaning of Article V, Section 3, of the Constitution, and by reason thereof was unconstitutional even if there were legislative sanction for it.

The defendants insist that the complaint falls short of the plaintiff's undertaking; that it fails to state facts sufficient to constitute a cause of action; and that consequently the judgment of the trial court sustaining the demurrer and dismissing the case should be affirmed.

The defendants lay hold upon the allegation of paragraph ten of the complaint that "the tax levy, the appropriation, and the expenditures, gifts and donations, above described, are and were purported to have been made under the provisions of Chapter 158 of the General Statutes of North Carolina," and advance this argument to support their position: That this specific portion of paragraph ten of the complaint is a factual averment in which the plaintiff alleges that the tax money in suit was expended by the Chamber of Commerce under the direction and control of the governing body of Burlington for the objects mentioned in G.S. 158-1; that these objects constitute public purposes as a matter of constitutional law under Article V, Section 3, of the Constitution; and that it thus appears on the face of the complaint that the expenditure in question was made pursuant to a statute, *i.e.,* Chapter 158 of the General Statutes, enacted in conformity to the Constitution, and by reason thereof the complaint states no cause of action.

G.S. 158-1 provides that the governing body of any city, whose qualified voters have approved Chapter 158 of the General Statutes in an appropriate election, may annually set apart and appropriate from the funds derived annually from the general taxes levied and collected in the city an amount not less than one-fortieth of one per cent, nor more than one-tenth of one per cent, upon the assessed value of all real and personal property taxable in the city, which funds shall be used and expended under the direction and control of the governing body of the city, under such rules and regulations or through such agencies as they shall prescribe, for the purpose of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near the city; encouraging the building of railroads thereto, and for such other purposes as will, in the discretion of the governing body of the city increase the population, taxable property, agricultural industries and business prospects of the city.

When the allegations of the complaint are analyzed in the light of the provisions of G.S. 158-1, it becomes plain that the defendants put an erroneous construction upon a single allegation of paragraph ten of the complaint; that they insist that such erroneous construction of that single allegation nullifies the other averments of the complaint diametrically contradicting it; and that they come in that way to their conclusion that the complaint is wholly insufficient.

As has been pointed out, the defendants base their contention that the complaint is fatally defective upon the premise that the selected allegation of paragraph ten of the complaint constitutes a factual averment on the part of plaintiff that the tax money in suit was expended by the Chamber of Commerce under the direction and control of the governing body of Burlington for the purposes specified in G.S. 158-1. This premise

is insupportable. This being true, the argument based on it is without validity.

The unsoundness of the position of the defendants becomes obvious when we disregard the allegations of the complaint which state legal conclusions rather than facts, and by-pass for the moment the portion of paragraph ten designated with particularity by the defendants.

The complaint does not allege that the tax money in suit was expended by the Chamber of Commerce under the direction and control of the governing body of Burlington. The averment is precisely to the contrary. Paragraph eight specifically asserts in the most explicit language that the money in question was turned over to the Chamber of Commerce by the municipality free from "any restrictions, conditions, or requirements" as to its use, and with intent on the part of the municipal officers that it should be used by the Chamber of Commerce in its "untrammeled discretion in furtherance of the ordinary . . . activities of said Chamber of Commerce."

Furthermore, the complaint does not say that the tax money was expended to accomplish the objects mentioned in G.S. 158-1. The averment is otherwise. Paragraph nine alleges in no uncertain terms that the money was mingled with the general funds of the Chamber of Commerce "derived from numerous other sources," and was "used, pro rata, for all the . . . expenses of said Chamber of Commerce." Neither the law nor the lexicographer sustains the assumption or conclusion that the corporate activities and purposes of the Chamber of Commerce are synonymous with the objects enumerated in G.S. 158-1.

We now return to the designated portion of paragraph ten of the complaint, and observe that it harmonizes in all respects with the other allegations of the pleading. The designated averment relates to these things: (1) "The tax levy . . . above described," *i.e.,* the portion of the *ad valorem* taxes levied and collected for the ostensible purpose of covering the item in the budget estimate bearing the indefinite description "Publicity: Chamber of Commerce, $2,000.00"; (2) "the appropriation, . . . gifts, and donations, above described," *i.e.,* the tax moneys totalling $2,000.00 which the municipality turned over to the Chamber of Commerce free from any "restrictions, conditions, or requirements" as to its use and with intent on the part of the officers of the municipality that it should be used by the Chamber of Commerce in its "untrammeled discretion in furtherance of the ordinary . . . activities of said Chamber of Commerce"; and (3) "the expenditure . . . above described," *i.e.,* the tax moneys aggregating $2,000.00 which the Chamber of Commerce mingled with its general funds "derived from numerous other sources" and "used, pro rata, for all the . . . expenses of said Chamber of Commerce."

The selected part of paragraph ten does not allege that the officers of Burlington and the Chamber of Commerce acted in the premises under Chapter 158 of the General Statutes. It merely states that they purported, *i.e.,* professed outwardly, or pretended to do so. Skeat's Etymological Dictionary of the English Language (4th Ed.), 487; Funk and Wagnall's New Standard Dictionary of the English Language, 2013; *S. v. Harris,* 27 N.C. 287. When the selected part of paragraph ten is read contextually with the succeeding paragraph of the complaint, it says this and nothing more: The municipal officers and the Chamber of Commerce professed outwardly or pretended to act under Chapter 158 of the General Statutes, but their acts were "unlawful, illegal, and unauthorized," *i.e.,* not done pursuant to that statute or any other law.

No statute undertakes to authorize Burlington to use its tax revenues for the payment of expenses incident to the ordinary corporate activities of the Chamber of Commerce. This being so, it necessarily follows that the complaint states a good cause of action to compel the restoration of funds which have been unlawfully diverted from the public treasury of the municipality. 52 Am. Jur., Taxpayers' Actions, sections 13, 35; 44 C.J., Municipal Corporations, section 4564.

Since the complaint avers that the outlay in suit was for the payment of the ordinary expenses of the Chamber of Commerce, and since such outlay is without statutory authorization, no occasion arises on the present appeal for deciding whether the ordinary activities of the Chamber of Commerce, or the objects enumerated in G.S. 158-1 constitute public purposes in a constitutional sense. In consequence, we express no opinions as to those matters in deference to the settled rule that courts will not pass on constitutional questions until the necessity for so doing has arisen. *Jarrell v. Snow,* 225 N.C. 430, 35 S.E. 2d 273; *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211; *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22; *S. v. Smith,* 211 N.C. 206, 189 S.E. 509; *S. v. Ellis,* 210 N.C. 166, 185 S.E. 663; *In re Parker,* 209 N.C. 693, 184 S.E. 532; *Goldsboro v. Supply Co.,* 200 N.C. 405, 157 S.E. 58; *Chemical Co. v. Turner,* 190 N.C. 471, 130 S.E. 154; *S. v. Edwards,* 190 N.C. 322, 130 S.E. 10.

We deem it proper, however, to observe that *Ketchie v. Hedrick,* 186 N.C. 392, 119 S.E. 767, 31 A.L.R. 491, is not an authority for the proposition that the objects enumerated in Chapter 268 of the Private Laws of 1923 constitute public purposes under Article V, Section 3, of the Constitution. It decides this and nothing more: That expenditures for such objects are not necessary expenses of municipalities within the purview of Article VII, Section 7, of the Constitution.

Since the complaint is sufficient to call into play the doctrine that "a tax is an imposition for the supply of the public treasury and not for

the supply of individuals or private corporations, however benevolent they may be," the court below ought to have overruled the demurrer, and required the defendants to answer. 51 Am. Jur., Taxation, section 6. For this reason, the judgment is

Reversed.

MRS. INEZ TOMBERLIN GALLOWAY, WIDOW; CHARLES MILTON GALLOWAY, MINOR SON OF CHARLES ELAM GALLOWAY, DECEASED (EMPLOYEE), PLAINTIFFS, v. DEPARTMENT OF MOTOR VEHICLES, STATE HIGHWAY PATROL, SELF-INSURER (EMPLOYER-CARRIER), DEFENDANT,

and

NATHAN DON DAVIS, FATHER, MRS. EVA MAE HYATT DAVIS, MOTHER OF JOSEPH ROBERT DAVIS, DECEASED (EMPLOYEE), PLAINTIFFS, v. DEPARTMENT OF MOTOR VEHICLES, STATE HIGHWAY PATROL, SELF-INSURER (EMPLOYER-CARRIER), DEFENDANT.

(Filed 1 March, 1950.)

1. Arrest and Bail § 1b: Highways § 9—

Where a Highway Patrolman is advised by a person that an armed convict had come to her home, made threats, and demanded food, such patrolman is given authority under G.S. 20-188 to arrest such convict. The word "accused" as used in the statute is used in the generic sense and does not import that the person to be arrested must have been accused of crime by judicial procedure, and armed robbery is a crime of violence within the meaning of the statute.

2. Same—

The use of an airplane by members of the Highway Patrol in reconnoitering to locate a person sought to be arrested by them is not a departure from the terms of their employment.

3. Master and Servant § 40d—

The death of Highway Patrolmen in a plane crash while attempting to locate and arrest a person accused of a crime of violence *is held* compensable under the Workmen's Compensation Act, since the patrolmen had authority to make the arrest and did not exceed their authority in using an airplane in their attempted discharge of their duties.

DEFENDANT'S appeal from *Moore, J.*, August 1949 Term of CHEROKEE Superior Court.

The compensation claims, subject of this appeal, grew out of a common accident and are consolidated for hearing and consideration. The claims were filed before the Industrial Commission under the Workmen's Compensation Act for compensation, respectively, for the injury and death of Charles Elam Galloway and Joseph Robert Davis by accident in the

course of their employment by the Department of Motor Vehicles, self-insurer, while serving as members of the State Highway Patrol.

Galloway and Davis lost their lives in the crash of an airplane being used by them in an attempt to locate in a densely wooded and mountainous section of Cherokee and Clay Counties a man whom they intended to arrest. The evidence discloses that some time prior to the attempt made by these patrolmen an escaped convict or person dressed in convict's clothes, had been hiding in this area and the attempt of the patrolmen to locate and arrest the person was immediately instigated by information voluntarily given by Eva Mae Stevens, who, with her father, went to Andrews to report to Patrolman Joe Bob Davis having seen the person subject of this rumor at her home and related to Davis, one of the above named patrolmen, that fact and the circumstances attending the visit of the man to her home. She had previously reported his presence to other officers who were unable to locate the man.

Miss Stevens testified that she had informed Patrolman Davis that an escaped convict had come to the Stevens home out of the woods, dressed in stripes and having a pistol such as are carried by State Highway Patrolmen. According to her evidence the man stated that he had been watching the house from the woods which was not over 25 yards away, and had come more than once.

The witness stated that there were only two families living about a mile apart in an isolated situation about five miles from any settlement and not upon any highway. She informed the patrolman that the "man dressed in prison stripes was threatening to kill us and anything else he could do and wanted something else to eat." That prior to May 3, which was the date of the death of Galloway and Davis, she had reported the fact that an escaped convict was near her home to Sheriff Swanson of Clay County but that he had failed to apprehend the convict. That on May 3, about two hours before the deceased employee Bob Davis was killed, or about 11 o'clock, that she, with her father, went to the Town of Andrews and she reported the circumstances of the convict, or the man dressed in prisoner's clothes, calling at her home and demanding something to eat, to Joseph Robert Davis, Highway Patrolman, and that Patrolman Davis informed her that he would be there that night to get him.

The claimants' evidence discloses that Patrolman Davis immediately called upon Patrolman Galloway and that together they discussed plans to apprehend the man. Since his supposed hiding place was in a mountainous section cut off on one side by the Tusquitee Mountains and on the other side by a lake, with a difficult road leading into the area and the probability that they might be seen from the mountains or hills as they attempted to enter it in the daytime, they planned to use an air-

plane to reconnoiter the country on the possibility of locating the person sought, with intention of going in on foot to the wooded section after 12 o'clock that night.

In pursuance of that plan they procured a small plane at an airport near Andrews and undertook the flight shortly after the information had been given to them. For some reason which does not appear the plane crashed shortly after taking off and both patrolmen were killed.

Both patrolmen were licensed pilots and one of them had extensive experience in aviation during the late war.

There is evidence that the Department had not expressly or otherwise authorized the use of an airplane by members of the Highway Patrol in their operations, and the evidence does not indicate that it had been forbidden. It does appear that motor cars and other equipment had been furnished them.

It further appears from the evidence that the Highway Patrol by practice of long standing had assisted in the apprehension of escaped convicts; but their authority to perform this duty under the law is questioned or denied by the appellant.

The first hearing was had before Hon. Pat Kimzey, member of the Commission, in which compensation was allowed. The department applied for a review by the full Commission; and the full Commission, striking out the findings of fact theretofore made by Commissioner Kimzey, found facts, made conclusions of law, and made an award denying compensation in both cases.

While the opinion is written by Commissioner Jurney, the formal notice of award bases the final action of the Commission in denying compensation on the conclusion of law that the claimants exceeded their authority in using an airplane in reconnoitering in attempting to apprehend the fugitive. (Record, pp. 108-109.) The claimants appealed from the judgment of award by the Industrial Commission and the matter was heard before Moore, J., at August 1949 Term of Cherokee Superior Court. Upon a hearing of the matter Judge Moore reversed the judgment of the Industrial Commission, finding that upon the evidence the patrolmen Galloway and Davis received their injury and death by accident arising out of their employment and in its course. The defendant appealed.

E. C. Bryson, T. D. Bryson, Jr., and McKinley Edwards for plaintiffs, appellees.

Attorney-General McMullan and Assistant Attorneys-General James E. Tucker and Peyton Abbott for defendant, appellant.

SEAWELL, J. Although the final award of the Industrial Commission denying compensation to the above claimants, using identical language in each case, was expressly predicated on the legal conclusion that they had exceeded their authority in using an airplane in attempted reconnoiter to locate the person they intended to apprehend, and not upon their want of authority to make the arrest, (and the main argument here is still pitched on that ground), counsel insists that the members of the State Highway Patrol have no power to arrest an escaped convict, and that Galloway and Davis in the attempt to do so were acting without the scope of their employment and should be denied compensation.

The evidence discloses that for a long while the Highway Patrol had been customarily exercising that power; and it is agreed between the parties that there had been no instruction or ruling whatever on the matter, either directive or inhibitive,—as to the use of this convenient, not unusual, and seemingly effective instrumentality in the process of apprehension and arrest of offenders against the law. Whether this was under the direction of the employing Department or simply with their acquiescence does not appear; but it is an activity which from the widespread distribution of the State Patrol, their knowledge of the highways and their facilities for instant intercommunication they are well fitted. But we do not find it necessary to pass upon the authority of the patrolmen to make an arrest of "escaped convicts," or to say whether the defense is available to the appellant which might, if a private employer, be somewhat bound by custom and mutual dealing between the parties. Leaving this aside, the appeal hinges more immediately on the question whether the claimants, members of the State Highway Patrol, had legal authority to arrest the person described in the information given to them by or through Miss Stevens because of the conduct of the man described as an escaped convict on his visit to her home. The appellees contend that the information in its particulars amounted to an accusation of a criminal offense on the part of the supposed convict, committed on his visit to the home, which justified his arrest by a State Highway Patrolman regardless of his status as a convict or perpetrator of any previous offense. This requires a critical examination of the statute invoked by the claimants-appellees as conferring such authority.

The limited jurisdiction of the Highway Patrol, ordinarily confined to violations of highway or traffic laws and regulations, is extended to offenses not thus related by G.S. 20-188, which reads as follows:

> "The state highway patrol shall have full power and authority to perform such additional duties as peace officers as may from time to time be directed by the Governor, *and such officers may at any time and without special authority, either upon their own motion* or at the request of any sheriff or local police authority, *arrest per-*

sons accused of highway robbery, bank robbery, murder, *or other crimes of violence."*

The power given to the Governor as the chief executive officer of the State, Constitution, Article III, Section 1, to meet from time to time emergent conditions, such as mass violations of law with which the ordinary civil constabulary is insufficient to deal, came into the law as a logical and salutary provision soon after the organization of the Highway Patrol. The part of the statute relied upon by the appellee, however, has nothing to do with the gubernatorial authority and there is no evidence that it was had. It is confined to the latter part of the statute, (underscored for separate attention), which provides that "such officers may at any time and without special authority either upon their own motion or at the request of any sheriff or local police authority, arrest persons accused of highway robbery, bank robbery, murder, or other crimes of violence."

The contention of the appellees is that the officers who undertook to find and arrest the subject of Miss Stevens' information had authority to act in the premises "upon their own motion" because her information amounted in substance to an accusation of a "crime of violence" within the purview of the statute, to wit: Armed robbery from the person, since he was fed or food given him because his statement that he wanted something more to eat was backed by a display of firearms and a threat to kill. We think this statement, made to the patrolman, may be reasonably so construed.

In the argument here the defendant Department points out that according to the statement of Miss Stevens the "escaped convict" was from a distant state, "2,000 miles away"; but there is no evidence that that information was conveyed to the patrolmen. In the much narrowed area of discussion as to the source of authority it makes no difference as to the status of the man sought as an escaped convict—whether he wore stripes or dungarees, or hailed from Kalamazoo or Timbucktu. He was a man accused of a crime definitely analogous to those named in the cited law, or if not so, then covering a still more extensive category as a crime of violence and it makes no difference whether we apply the principle *ejusdem generis* to the latter phrase or accept it as an independent delegation of authority.

It is clear, we think, that the term "accused" was not used in the law in a technical sense but in the generic and popular sense. It is defined in Bouvier's Law Dictionary as:

> "To charge or impute the commission of crime or immoral or disgraceful conduct or official delinquency. It does not necessarily import the charge of a crime by judicial procedure; *State v. South,*

5 Rich (S.C.) 489, 493; *Com. v. O'Brien,* 12 Cush. (Mass.) 84; *Robbins v. Smith,* 47 Conn. 182; 1 C. & P. 479."

We note the extent of the power given to the Highway Patrol under this statute,—and we have carefully considered this in its bearing on the correct interpretation; but we can reach no other result as to the legislative intent. With the propriety of the legislation we have nothing to do—that is a matter of legislative discretion, political rather than juridical.

The contention that the claimants departed from the terms of their employment by using an airplane in an effort to locate or find the man they sought to arrest is without merit. There is nothing novel or unusual in the use of an airplane for any purpose for which it is suitable, either in transportation or reconnoiter. The evidence tends to show that its use in the manner intended had been attended with success in other instances. Bearing on this phase of the case see *Fournier's Case,* 120 Me. 236, 113 A. 270, 272, 23 A.L.R. 1156; *Archie v. Lumber Co.,* 222 N.C. 477, 23 S.E. 2d 834; *Travelers Ins. Co. v. Burden,* 94 F. 2d 880.

For these reasons the judgment of the Superior Court must be affirmed. It is so ordered.

Galloway v. Department of Motor Vehicles—Affirmed.

Davis v. Department of Motor Vehicles—Affirmed.

LLOYD L. MEEKINS v. AETNA INSURANCE COMPANY.

(Filed 1 March, 1950.)

1. Insurance § 25a—

The statutory requirement that an action on a fire insurance policy must be instituted within twelve months after the loss unless a longer time to institute suit is agreed upon between the parties and such agreement appears on the face of the policy, is binding upon the parties in the absence of waiver or estoppel, and where insured, instituting action more than twelve months after the loss, relies upon the statutory exception he must plead facts bringing himself thereunder. G.S. 58-177.

2. Insurance § 24a—Facts alleged held sufficient to constitute waiver of policy requirement as to time for furnishing proof of loss.

In this action on a fire policy, insured alleged that he furnished proof of loss in due time, which proof was retained by insurer without objection, that negotiations were entered into for the payment or satisfactory adjustment of the loss, that some eleven months thereafter insurer, acting through the adjustment bureau, demanded additional proof of loss, which was given by insured on the forms furnished, which additional proofs were

refused for reasons other than failure to file same earlier, and that a third set of forms for proof of loss were furnished through the adjustment bureau more than fourteen months after the loss. *Held:* The complaint sufficiently sets up waiver by insurer of the provisions of the policy as to time within which proof of loss was required to be submitted.

3. Insurance § 25a—

The provision in a fire policy that action thereon must be instituted within twelve months after the fire is a contractual requirement and not a statute of limitations, and is subject to waiver or estoppel.

4. Same—

Where insurer enters into negotiations with insured and promises that the claim will be paid or satisfactorily adjusted upon completion of investigation, and thereafter insurer demands additional proof of loss without denying the claim too late for suit to be brought within the twelve months period, insurer waives the policy provision requiring action to be instituted within twelve months next after loss. G.S. 58-177.

APPEAL by defendant from *Nimocks, J.,* at October Term, 1950, of DARE.

This is an action instituted 17 September, 1949, on a policy of fire insurance issued on 2 July, 1947, by the defendant on a building and contents owned by the plaintiff, which building and contents were destroyed by fire on 25 July, 1947.

The plaintiff alleges in his complaint, among other things, the following: (1) Immediate notice of the fire loss or damage was given by the plaintiff to the defendant; (2) that thereafter defendant entered into negotiations with plaintiff with respect to payment of said fire loss and upon inquiry from time to time about the status of his claim he was advised the matter was having defendant's attention; and, he was promised that as and when the defendant had completed its investigation of the claim and had received the necessary or required data, his insurance claim would be paid and/or satisfactorily adjusted; (3) that such proof of loss as plaintiff had given was retained without objection by the defendant; (4) that on 26 June, 1948, the plaintiff made demand through an attorney for the payment of his claim, whereupon the Adjustment Bureau handling the claim for the defendant advised the attorney on 16 July, 1948, that it was the position of the defendant company that no proper proof of loss had been received (though plaintiff had theretofore given a demanded proof of loss, which had been retained by the defendant without objection), and that the matter would be given attention as and when such proof of loss was received; (5) that the attorney for the plaintiff then requested that forms for submitting proof of loss be furnished and that same would be filed without prejudice to the plaintiff's existing rights under the policy; (6) that additional forms for proof

of loss were furnished by the defendant through the Adjustment Bureau on 24 July, 1948, and proof of loss was sent to said Bureau on or about 11 August, 1948; that the defendant declined to accept said documents as satisfactory proof of loss for certain enumerated reasons set out in a letter to the plaintiff's attorney dated 28 September, 1948, none of which was based on the failure to file proof of loss earlier; (7) that the defendant on or about 28 September, 1948, furnished, through the Adjustment Bureau, additional forms for proof of loss, which forms were filled out, executed and forwarded to the defendant through said Bureau on 12 October, 1948, and that such proof of loss has been in the possession of the defendant or its agent since the above date; (8) that the defendant caused this plaintiff to be indicted and prosecuted for filing the proof of loss dated 12 October, 1948, contending that the plaintiff was guilty of making a false insurance claim in violation of G.S. 14-214, and that upon the trial of said criminal action in May, 1949, the plaintiff herein, defendant therein, was acquitted by the jury; (9) that the defendant now refuses to pay plaintiff's claim in the sum of $1,250.00.

The defendant demurs to the complaint on the ground that it does not state a cause of action, for that the plaintiff did not commence his action on the policy within twelve months next after the inception of the loss, as required by G.S. 58-177. Demurrer overruled and defendant appeals and assigns error.

J. Henry LeRoy and John H. Hall for plaintiff.
Wilson & Wilson for defendant.

DENNY, J. The demurrer interposed by the defendant raises two questions: (1) Is the plaintiff, in the absence of waiver or estoppel, bound by the provision in the Standard Fire Insurance Policy of the State of North Carolina, as set forth in G.S. 58-177, which requires that an action to recover thereon must be instituted within twelve months from the inception of the loss, unless a longer time for instituting suit has been agreed upon between the parties and such agreement appears on the face of the policy, as authorized by Chapter 378 of 1945 Session Laws of North Carolina, G.S. 58-177, and such extension of time is pleaded? (2) If so, does the complaint allege sufficient facts to constitute waiver or estoppel?

The first question should be answered in the affirmative. One who relies upon an exception in a statute, in order to obtain the benefit thereof, must so cast his pleading as to bring himself within the exception. McIntosh's N. C. Practice and Procedure, Section 357; 41 Amer. Jur., Pleading, Section 93; *Schlemmer v. Buffalo R. & P. R. Co.,* 205 U.S. 1, 51 Law Ed. 681; *Baldwin v. Lev,* 163 Misc. 929, 297 N.Y.S. 963;

Rose v. Petaluma & S. R. Ry. Co., 64 Cal. App. 213, 221 Pac. 406; Anno. 130 A.L.R. 440, *et seq. Cf. S. v. Johnson,* 229 N.C. 701, 51 S.E. 2d 186, and *S. v. Davis,* 214 N.C. 787, 1 S.E. 2d 104.

Likewise, we think the second question should be answered in the affirmative. Immediate notice of the fire and loss or damage was given to the defendant, as required by the policy. Proof of loss was filed by the plaintiff with the defendant and retained by it without objection. Thereafter, defendant entered into negotiations with the plaintiff about the payment of his claim and upon inquiry from time to time about its status he was advised the matter was having defendant's attention; and, he was promised that as and when the defendant completed its investigation of the claim and had received the necessary or required data, the claim would be paid and/or satisfactorily adjusted. But, not until 16 July, 1948, eleven months and twenty-one days after the fire, in response to a demand for payment made by plaintiff through an attorney, was the plaintiff informed that any additional data or proof of loss was required of him. And this information was obtained from the Adjustment Bureau and not from the defendant. Additional forms for proof of loss were furnished by the defendant through the Adjustment Bureau, on 24 July, 1948, eleven months and twenty-nine days after the fire. The additional proof of loss was sent to the Adjustment Bureau on or about 11 August, 1948. The plaintiff was informed by letter from the Adjustment Bureau, dated 28 September, 1948, that the defendant declined to accept said documents as satisfactory proof of loss for certain enumerated reasons, none of which was based on the failure to file proof of loss earlier; but, on the contrary, the defendant furnished through the Adjustment Bureau additional forms for proof of loss, which were executed and forwarded to the defendant through the Adjustment Bureau on 12 October, 1948. It will be noted, these last documents to be used in filing proof of loss under this policy were furnished by the defendant or its agent more than fourteen months after the fire.

This Court said, in *Strause v. Insurance Company,* 128 N.C. 64, 38 S.E. 256: "It is well settled that the adjuster of the insurance company may by his acts or declarations waive the requirements as to proofs of loss, especially as to time." Here the allegation is to the effect that the defendant, acting through the Adjustment Bureau, required the plaintiff to file additional proofs more than fourteen months after the fire. We think this is some evidence to support the view that the defendant waived any provision in the policy as to the time in which proof of loss was required to be submitted.

But what about the stipulation in the policy which requires any action on the policy to be instituted "within twelve months next after the fire"? This stipulation is a contract, and not a statute of limitations, and may

be waived, or the party for whose benefit it was inserted may be estopped by his conduct from insisting upon its enforcement. *Dibbrell v. Insurance Company,* 110 N.C. 193, 14 S.E. 783; *Hardy v. Insurance Company,* 180 N.C. 180, 104 S.E. 166; *Beard v. Sovereign Lodge,* 184 N.C. 154, 113 S.E. 661; *Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800; *Zibelin v. Insurance Company,* 229 N.C. 567, 50 S.E. 2d 290.

In the case of *Dibbrell v. Insurance Company, supra,* it is said: "As a general rule, if the insurer, through the conduct of any agent acting within the scope of his authority, leads the insured into an infraction of one of the conditions of a policy by insisting upon the performance of a duty enjoined by another clause of the policy, and inconsistent with the observance of such condition, the insurer will be estopped from insisting upon a forfeiture. . . . And it has been expressly held that 'statements by a local insurance agent that the plaintiff's loss was all right,' and that the company would pay the amount, constitutes a waiver by the company of the clause in the policy requiring formal proof of loss, and also 'the one barring suits not brought within one year.' . . . In *Muse v. Assurance Co.,* 108 N.C. 242, it is declared that such stipulations, operating as forfeitures, are construed strictly, and comparatively slight evidences of waiver have been held sufficient to prevent their enforcement. *Ripey v. Insurance Company,* 22 Barb. 552; *Ames v. Insurance Company,* 14 N.Y. 253."

Furthermore, in *Modlin v. Insurance Company,* 151 N.C. 35, 65 S.E. 605, this Court cited the case of *Titus v. Insurance Company,* 81 N.Y. 410, and quoted from the opinion therein the following: "When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention may be inferred or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obligated to do so or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as a matter of law waived," citing in support thereof *Insurance Company v. Norton,* 96 U.S. 234; 24 L. Ed. 689; *Horton v. Insurance Company,* 122 N.C. 498, and *Collins v. Insurance Company,* 79 N.C. 279.

We think where an insurance company issues its policy, accepts the premium or premiums therefor, and the insured suffers a loss which the policy purports to cover, the insurance company will not be permitted to enforce the stipulation as to the time for instituting an action thereon, if it promises the insured his claim will be paid or satisfactorily adjusted, when the insurer completes its investigation and receives the necessary or required data, and the claim for loss is not denied nor demand made for additional proof of loss until too late for the suit to be brought within the stipulated time of twelve months next after the fire. In the case before us, if the plaintiff had been in a position to file additional proof of loss on 16 July, 1948, when he was first notified that the defendant had taken the position that his original proof of loss did not constitute a proper proof of loss, his claim would not have been due and payable until after the expiration of sixty days from the date of filing such proof of loss, if we concede the correctness of the defendant's contention that no proof of loss had been filed theretofore. If the defendant was acting in good faith in requiring these additional proofs of loss, then it cannot be doubted that it intended to waive the stipulated time for instituting an action for the collection of the claim. *Dibbrell v. Insurance Company, supra; Higson v. Insurance Company,* 152 N.C. 206, 67 S.E. 509.

We think the complaint alleges sufficient facts, if supported by competent evidence, to carry the case to the jury on the question of waiver and estoppel. It would seem that if the defendant, by its promises and conduct, was responsible for the delay in filing a proper proof of loss and waived the time for filing such proof until the claim thereunder did not fall due and payable until after the expiration of twelve months next after the fire, it would be estopped from enforcing the provision in the policy which requires the action to be brought within twelve months next after the fire. However that may be, the question of waiver and estoppel is one for the twelve.

Tatham v. Insurance Company, 181 N.C. 434, 107 S.E. 450, and similar cases, are not controlling on this record.

The ruling of the court below will be upheld.

Affirmed.

STATE OF NORTH CAROLINA, EX REL. WILLIAM McCRAE ROBERTS, v. OTTO McDEVITT.

(Filed 1 March, 1950.)

1. Public Officers § 2: Counties § 8½: Evidence § 37—

Where there is no statutory requirement that a county board keep minutes and records of its proceedings, and such board keeps no written minutes, parol evidence is admissible to show the action of the board.

2. Public Officers § 5a—

Where a person who has been recognized by officials and the public generally as the chairman of a county board and who has discharged the duties of his office in such capacity without question, his authority to exercise his statutory power to vote *ex officio* as an elector in the election of another county official cannot be collaterally attacked in an action contesting election of such other county official.

3. Counties § 7: Public Officers § 2—

The Chairman of the Board of Health of Madison County under the general law *is held* entitled to vote *ex officio* in the election of the tax collector for said county under the provisions of Chap. 341, Public-Local Laws of 1931.

4. Public Officers § 2: Elections § 16—

A tie in the vote of the duly qualified electors of a county official results in no election and the vacancy of such office.

5. Counties § 5: Public Officers § 2—

Where there is a vacancy in the office of tax manager for a county, the board of county commissioners has the power by analogy to G.S. 153-9 (12), G.S. 153-9 (10) to appoint some qualified person to perform the duties of the office for the remainder of the term.

APPEAL by respondent from *Nettles, J.*, November Term, 1949, of MADISON. Reversed.

This was an action in the nature of *quo warranto* instituted by relator Roberts to determine his right to the office of Tax Manager or Tax Collector of Madison County, also claimed by respondent McDevitt.

The method of election to this office in Madison County was prescribed by Chapter 341, Public-Local Laws 1931. By this Act the Chairman of the Board of Education, Chairman of Board of County Commissioners, Chairman of the Board of Health, Chairman of the Sinking Fund Commission, and their successors in office, together with "the Chairmen of any other Boards that may be created by this Legislature for Madison County," were required to meet on first Monday in August, 1931, and biennially thereafter, and elect a tax manager for a term of two years. The General Assembly also at the same session created a Jury and Tax

Commission for Madison County, and a Highway Commission. So that originally the electors empowered by the Act to elect a tax manager consisted of the six chairmen of the named Boards. However, the Act creating Jury and Tax Commission was held unconstitutional by this Court in *Brigman v. Baley,* 213 N.C. 119, 195 S.E. 617; and the Highway Commission was abolished by Chap. 1131, Session Laws 1949. The Act of 1931 (Chap. 322) creating a Board of Health for Madison County was held void as within the prohibition of Art. II, sec. 29, of the Constitution in *Sams v. Commissioners,* 217 N.C. 284, 7 S.E. 2d 540, but by the general statute, G.S. 130-18, provision was made for County Boards of Health and for the selection of chairmen thereof, and it was admitted that pursuant to the general law Dr. Arthur Ramsey was on 1 August, 1949, and still is, chairman of the County Board of Health for Madison County.

It was stipulated that on 1 August, 1949, purporting to act under the provisions of Chap. 341, Public-Local Laws 1931, J. Clyde Brown, Chairman of the Board of Education, and F. E. Freeman, as Chairman of the Sinking Fund Commission, met and elected relator William McCrae Roberts tax manager; and that on same day Roy Roberts, Chairman of the Board of County Commissioners, and Dr. Arthur M. Ramsey as Chairman of the Board of Health, met and elected respondent Otto McDevitt as tax manager for Madison County.

Subsequently, on the same day, the Board of County Commissioners of Madison County adopted a resolution recognizing the election of respondent McDevitt, and further declaring if it be determined that Brown, Freeman, Roberts, and Ramsey were all entitled to vote in the election of tax manager, that then there was no election, and the Board declared under those circumstances there was a hiatus in the machinery for election of tax manager and a vacancy in the office, and thereupon appointed respondent Otto McDevitt to fill said office until August, 1951.

Relator alleged that Brown, Roberts and Freeman were entitled to vote but denied the right of Dr. Ramsey to do so, and claimed election by two of the three eligible votes.

Respondent admitted Brown and Roberts were entitled to vote, alleged that Ramsey was also a legal elector, but denied the right of Freeman to participate on the ground that the Sinking Fund Commission had ceased to function and had no legally appointed chairman. Respondent likewise claimed election by two of the three eligible votes.

Both relator and respondent have subscribed oath and given bond as Tax Manager. Pending the outcome of this action by agreement of all parties another person is acting as tax collector for the County.

The court submitted to the jury the following issues:

"1. Was the Sinking Fund Commission of Madison County operating and functioning on the first day of August, 1949?

"2. Was F. E. Freeman acting and qualified chairman of said Sinking Fund Commission on the first day of August, 1949?"

The court charged the jury if they found the facts to be as testified by the witnesses and shown by all the evidence to answer both issues yes. The jury answered the issues yes, and upon the verdict and stipulations judgment was entered declaring relator the duly elected Tax Manager of Madison County and entitled to the records, equipment and emoluments of the office.

Respondent excepted and appealed.

J. M. Baley, Jr., and Clyde M. Roberts for respondent, appellant.

A. E. Leake and J. W. Haynes for relator, appellee.

DEVIN, J. Local laws enacted by the General Assembly regulating the affairs of Madison County have proved a prolific source of litigation. *Brigman v. Baley,* 213 N.C. 119, 195 S.E. 617; *Reed v. Commissioners,* 213 N.C. 145, 195 S.E. 620; *Waldroup v. Ferguson,* 213 N.C. 198, 195 S.E. 615; *Freeman v. Commissioners,* 217 N.C. 209, 7 S.E. 2d 354; *Sams v. Commissioners,* 217 N.C. 284, 7 S.E. 2d 540; *Hill v. Ponder,* 221 N.C. 58, 19 S.E. 2d 5; *Freeman v. Commissioners,* 221 N.C. 63, 19 S.E. 2d 9.

The case now before us presents the question of the validity of an attempted election to the office of tax manager for Madison County under the provisions of Chapter 341, Public-Local Laws 1931. Each of the parties to this action, relator and respondent, asserts title to the office as result of election in accord with the machinery prescribed by this Act. The Act itself was upheld as a valid exercise of legislative power in *Freeman v. Commissioners,* 217 N.C. 209, 7 S.E. 2d 354, where its pertinent provisions are stated.

The Act prescribed that the only method for the election of a person to perform the duties of this office in Madison County was by the votes of the chairmen of designated Boards acting *ex officio.* Originally six chairmen constituted the electing body, but as result of statutory change (Chap. 1131, Session Laws 1949) and the judgment of this Court (*Brigman v. Baley, supra*) the number has been reduced to four; and of the four the rights of two are challenged.

The relator alleges in his complaint that Dr. Ramsey, who as chairman of the County Board of Health voted for the respondent, was not legally qualified to participate in the election of a tax manager. Likewise, the

respondent challenges the right of F. E. Freeman, who voted for relator, to qualify as an elector.

Two questions then are presented:

1. Was F. E. Freeman as chairman of the Sinking Fund Commission entitled to vote in the election?

2. Was Dr. Ramsey as chairman of the County Board of Health entitled to vote?

The Act of the General Assembly (Chap. 183, Public-Local Laws 1931) creating a Sinking Fund Commission for Madison County was held valid in *Freeman v. Commissioners,* 217 N.C. 209, 7 S.E. 2d 354, and the relator offered evidence, which was not rebutted, that F. E. Freeman was chairman of that Commission, and for 14 years had acted as such, performing all the duties prescribed by the Act for such chairman; that as chairman of this Commission he had handled the funds incident to bond settlements, signed checks, approved official bonds, kept joint control and check of collaterals impounded to secure public deposits in both banks, had participated without question in previous elections of tax managers and collectors, and had been recognized by officials and the public generally as the chairman of the Sinking Fund Commission for the entire time. True, no minutes or records of the Sinking Fund Commission showing Freeman's selection as chairman were offered, but it was testified no written minutes were kept. Hence, in the absence of statutory requirement for minutes and records, parol evidence was admissible to show the action of the Commission. *Tuttle v. Building Corp.,* 228 N.C. 507 (513), 46 S.E. 2d 313; *Bank of U. S. v. Dandridge,* 12 Wheaton (U.S.), 64 (69), Wigmore, sec. 2451. While the other members of the Sinking Fund Commission had not met in formal session in some years, there were no specific duties prescribed for them, other than the selection of a chairman and the filling of vacancies in the membership of the Commission. It was only upon the chairman as executive head of the Commission that important and continuous duties devolved. From an examination of the evidence in the record, we conclude there was no error in the court's instructing the jury if they found the facts to be as shown by all the evidence to answer the issues submitted in the affirmative. *Smith v. Carolina Beach,* 206 N.C. 834, 175 S.E. 313; *Freeman v. Commissioners,* 217 N.C. 209 (215), 7 S.E. 2d 354.

The jury having answered the issues accordingly, and the trial being free from prejudicial error, F. E. Freeman must be held to have been duly qualified to vote in the election of a tax manager in August, 1949.

2. Was Dr. Ramsey entitled to vote, as chairman of the Board of Health of Madison County, in the election of a tax manager August 1, 1949?

The Act of the General Assembly (Chap. 322, Public-Local Laws 1931) creating a local Board of Health for Madison County and naming its members was held invalid as coming within the prohibition of Art. II, sec. 29, of the Constitution, in *Sams v. Commissioners,* 217 N.C. 284, 7 S.E. 2d 540. However, it was stipulated by the parties hereto that under the general law (G.S. 130-18), a Board of Health in and for Madison County had been duly constituted, and that Dr. Ramsey was the duly qualified and acting chairman of the Board of Health of the County and was acting as such on August 1, 1949. It is urged by respondent that this stipulation constitutes an admission that he was qualified to vote under Chap. 341, Public-Local Laws of 1931, in the election of a tax manager. It will be noted that this Act specifically named the Chairman of the Board of Health and his successor in office as one of those empowered to vote in the election of a tax manager, and it was only in a later clause that the Act authorized voting by the chairmen of "any other Boards created by this Legislature." So it would seem that the chairmanship which Dr. Ramsey now holds does not come under this enlarging clause which limited the right to vote to Chairmen of Boards created by the Legislature of 1931, and that the Chairman of the Board of Health was named without qualification as an elector. True, Chapter 322 of the Acts of 1931 was held invalid as beyond the legislative power, but this left the general law still in force in Madison County. The Board which had been named in Chap. 341 was constituted in conformity with legal requirements as the Board of Health of Madison County. Furthermore, we observe that no issue was tendered by the relator as to the qualification of Dr. Ramsey, nor was evidence offered tending to impeach his qualification or right to vote in the election of a tax manager, nor was there a specific ruling by the court thereon, save inferentially in the judgment, the court stating that the stipulation referred to rendered it unnecessary to submit other issues than those relating to the Sinking Fund Commission and F. E. Freeman. The right of Dr. Ramsey does not seem to have been questioned on this record save by an allegation in the complaint.

3. It follows, if there were four qualified electors entitled to vote for a tax manager on August 1, 1949, and only four, and two of them voted for relator and two for respondent, there was no election. There being no one holding over and no one properly elected in the method prescribed by Chap. 341, Public-Local Laws 1931, there was a vacancy in the office of tax manager for Madison County. We think in case of a vacancy in this office by analogy to G.S. 153-9 (12) and G.S. 153-9 (10), and under their general power as to taxation and finance, the Board of County Commissioners would have the power to appoint some qualified person to perform the duties of this essential office for the remainder of the term

ending August 1, 1951. It appears that the Board of County Commissioners in view of an anticipated deadlock has already appointed the respondent.

After a careful consideration of the record in this case we reach the conclusion that the relator has failed to establish his right to the office of tax manager or tax collector for Madison County, and that the judgment below must be

Reversed.

IN THE MATTER OF THE WILL OF MARTHA WARREN WINBORNE, DECEASED.

(Filed 1 March, 1950.)

1. Wills § 17—

A check deposited with the clerk to be held in lieu of bond is insufficient to meet the requirements of G.S. 31-33.

2. Bills and Notes § 10—

A check is a bill of exchange drawn on a bank and does not operate as an assignment of any part of the funds to the credit of the drawer until the check is presented to and accepted by the bank, and the drawer at any time prior to acceptance is at liberty to stop payment and to withdraw his funds from the bank. G.S. 25-192, G.S. 25-197.

3. Wills § 17—

Compliance with G.S. 31-33 in respect to bond for costs is prerequisite to the institution of a caveat proceeding, and the mere filing of the caveat without compliance with the statute constitutes no valid attack upon the will and is insufficient to authorize the clerk to issue the required citations to bring interested parties into court.

4. Wills § 16—

The probate of a will in common form is conclusive and may be vacated or annulled only by direct proceeding in the manner provided by statute.

5. Wills § 17—

The statute permitting caveats is in derogation of the common law and must be strictly construed.

6. Same—

The requirement that caveat proceedings be instituted within seven years from the probate of the will in common form is a condition attached to the right to file caveat and may not be waived by the parties.

7. Same—

Where caveat is filed without compliance with G.S. 31-33 relating to bond, there is no valid caveat, and after the expiration of seven years the right to file caveat ceases to exist and may not be revived by the giving of a cash bond under an extension of time granted by the court after the expiration of the seven year period.

WINBORNE, J., took no part in the consideration or decision of this case.

APPEAL by propounders from *Nimocks, J.*, November Term, 1949, CHOWAN. Reversed.

Caveat proceeding heard on motion to dismiss.

Martha Warren Winborne died testate 19 January 1942. On 19 June 1942 the executors named therein tendered her will for probate, and it was duly admitted to probate in common form.

On 13 June 1949, Richard Winborne and wife appeared and filed a caveat to said will. At the same time, Richard Winborne deposited with the clerk his check in the sum of $200, drawn on the Farmers Bank of Nansemond of Suffolk, Va. There is written on the face of the check the following: "Bond for cost Re: WILL M. W. WINBORNE." Thereupon, the clerk issued citations to the devisees, legatees, and other interested parties and transferred the cause to the civil issue docket.

At the November Term, 1949, of the Superior Court of said county, the propounders, after due notice to the caveators, appeared and moved the court to (1) rescind the orders directing the service of citations, (2) vacate the order transferring the cause to the civil issue docket, and (3) strike the purported caveat for that the caveators have not complied with the provisions of G.S. 31-33 as amended respecting security for costs.

Counsel for caveators accepted service of the notice of said motion 29 November 1949, and the caveators, on that date, deposited with the clerk $200 in cash in lieu of bond. The clerk retained the check theretofore deposited with him.

The motion to dismiss was filed after propounders had answered and after one term of the Superior Court had expired subsequent to the filing of the caveat.

The court below, after hearing the motion, found the facts, adjudged that caveators have complied with the provisions of G.S. 31-33, denied the motion and ordered that, if need be, the time for filing bond be enlarged so as to include the day upon which the $200 in cash was deposited with the clerk.

The propounders excepted and appealed.

J. A. Pritchett and J. N. Pruden for caveator appellees.

J. C. B. Ehringhaus, Jr., for propounder appellants.

BARNHILL, J. The caveators insist that the check deposited by them comes within the phrase "or otherwise secure such costs" as used in the statute. This contention is not tenable. The phrase is but a part of a clause which gives it an entirely different meaning—"When a caveator shall have given bond . . . or . . . deposited money or given a mortgage

in lieu of such bond, or shall have filed affidavits and *satisfied the clerk of his inability to give such bond or otherwise secure* such costs . . ." The statute is clear. The caveator must give a bond or deposit cash or give a mortgage in lieu of bond. If he is unable to do any one of these three things, he must then file affidavits to that effect and also otherwise satisfy the clerk of his inability so to do.

A check deposited with the clerk is not a bond, and it does not constitute cash deposited in lieu of bond within the meaning of the statute. *Insurance Co. v. Stadiem,* 223 N.C. 49, 25 S.E. 2d 202.

A check is nothing more than a bill of exchange drawn on a bank, G.S. 25-192, and it does not operate as an assignment of any part of the funds to the credit of a drawer with the bank until it is presented to and accepted by the bank on which it is drawn. G.S. 25-197. The drawer is at all times, prior to acceptance by the bank, at liberty to stop payment or to withdraw his funds from the bank. Thus the check secures no one.

Here the drawer is a nonresident and the drawee bank is located in another State. The caveators, if they wish, could stop payment even after adverse verdict, return to their home State and leave the propounders without recourse. Furthermore, there is no evidence in the record tending to show that the drawer had funds in the bank sufficient to pay the check upon presentation. Nor is there evidence that the failure to present the check was due to the negligence of the clerk. Instead, the circumstances tend to show that the check was to be held in lieu of bond.

Contest of a will after probate in common form is an independent proceeding. The right does not exist independently of statutory authority. Hence it must be exercised only in accord with, and within the limitations prescribed by, the statute. *Glos v. Glos,* 173 N.E. 604, 72 A.L.R. 1328; *Re Meredith,* 266 N.W. 351, 104 A.L.R. 348.

No caveat is properly constituted until the statutory requirements are met. The mere filing of a caveat without complying with the provisions of G.S. 31-33 in respect to bond for costs is ineffectual. It constitutes no valid attack upon the will and is not sufficient to authorize the clerk to issue the required citations to bring interested parties into court. *In re Dupree's Will,* 163 N.C. 256, 79 S.E. 611.

So then, at the time the propounders moved to dismiss there was no valid caveat of record raising issues of fact in respect to the validity of the will. Did the deposit of $200 in cash in lieu of bond on 29 November 1949—five months and ten days after the seven-year period within which a caveat is permissible—cure the defect and validate the caveat?

We have frequently held that a judge has the discretionary power to allow the filing of a prosecution bond after the issuance and service of a summons. We may concede, without deciding, that ordinarily he has the same discretion in respect to the bond for costs required in a caveat

proceeding. In this connection, however, it is not amiss to note that the wording of the two statutes is not identical.

A civil action is commenced by the issuing of a summons, G.S. 1-88, and jurisdiction is acquired from the time of service thereof, G.S. 1-101; but before issuing a summons the clerk shall require the plaintiff to give a bond for costs or make a deposit in cash in lieu of bond or file written authorization to sue as a pauper. G.S. 1-109. In a caveat proceeding the clerk is authorized to act by issuing citations and transferring the cause to the civil issue docket only "when a caveator shall have given bond" or otherwise complied with the statute in respect thereto. G.S. 31-33, as amended by c. 781, Session Laws, 1947.

"The clerk cannot act until the bond is filed, or the cash deposited, or the mortgage is given, or the affidavits of inability to give security are filed . . ." Douglas, Administration of Estates in North Carolina, sec. 56. While this does not mean necessarily that the statute in respect to bonds shall be complied with at the time the caveat petition is filed, it does mean there must be compliance before the clerk acts by issuing citations and transferring the case to the civil issue docket.

Be that as it may, a different question is presented here. Conceding the general discretionary authority of the judge in such matters, may he permit compliance with the statute after the right to caveat has expired and thus give life and vitality to a dead cause? This is a question of first impression in this State. Counsel have not called our attention to any decision in point from any other jurisdiction and we have found none. Considering the question in the light of the history of the statute and the purpose underlying its enactment, we are constrained to answer in the negative.

The right to dispose of property by will at death is of ancient origin and is a favorite of the law. Once probated, a will is conclusive. It may not be collaterally attacked, and it is not to be lightly set at nought. Indeed, it may be vacated or annulled only in the manner provided by statute. *Edwards v. White,* 180 N.C. 55, 103 S.E. 901.

As the statute permitting caveats is in derogation of the common law, it must be strictly construed. *Damon v. McQuillin,* 152 S.W. 340, Ann. Cas. 1914B 526; *Braeuel v. Reuther,* 193 S.W. 283, Ann. Cas. 1918B 533; *McArthur v. Scott,* 113 U.S. 340, 28 L. Ed. 1015; 57 A.J. 520.

In enacting the statute as it now exists, the Legislature intended to circumscribe the right rather than limit the remedy. Any person interested in the estate of a decedent may, at the time of the application for probate of decedent's will in common form "or at any time within seven years thereafter," file a caveat. G.S. 31-32. This constitutes a statutory grant of a right. The time provision is more than a mere limitation which may be waived by the parties. It is a condition attached to the

right. Hence, upon the expiration of the seven-year period specified in the Act, the right ceases to exist.

The condition precedent to the filing of a caveat, *i.e.*, giving bond or complying with the statute in respect to costs, is similar to the provision in the wrongful death statute, G.S. 28-173, requiring suit to be brought within one year after death. Decisions under that statute are in point. *Curlee v. Power Co.*, 205 N.C. 644, 172 S.E. 329; *Webb v. Eggleston*, 228 N.C. 574, 46 S.E. 2d 700; *Lewis v. Highway & Public Works Comm.*, 228 N.C. 618, 46 S.E. 2d 705; *Wilson v. Chastain*, 230 N.C. 390.

When the caveators made the deposit of $200, there was no valid caveat of record. The deposit could give it life, if at all, only as of the day of deposit. At that time the right to caveat had expired and superior rights had intervened. Neither the caveators nor the court could revive it. Hence the judgment below must be

Reversed.

WINBORNE, J., took no part in the consideration and decision of this case.

STATE v. ARTHUR PERRY AND PERCY CONE.

(Filed 1 March, 1950.)

1. Intoxicating Liquor § 9d—

Evidence in this case *is held* sufficient to be submitted to the jury as to one defendant on the charges of illegal transportation and possession of intoxicating liquors and as to the other defendant on the charges of aiding and abetting therein.

2. Automobiles § 29b—

Evidence that defendant drove his car at a speed of between 80 and 90 miles per hour on the highway, *held* sufficient to be submitted to the jury on the charge of reckless driving.

3. Criminal Law § 50d—

The trial court may not by remarks or questions impeach the credibility of a witness or in any manner convey to the jury the impression that the testimony of a witness, in the opinion of the court, is probably unworthy of belief. G.S. 1-180.

4. Criminal Law § 78c—

Where a remark or question by the court amounts to an expression of opinion, an exception thereto need not be taken at the time but may be taken after verdict.

5. Criminal Law § 81c (7)—

A remark or question by the court during the progress of the trial, even though it amount to a prohibited expression of opinion by the court, will not entitle defendant to a new trial when the matter, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial.

6. Criminal Law § 48e—

The trial court has discretionary power to permit the State to offer additional evidence after the State and the defendants have rested their case when such additional evidence has a direct bearing on the case and its existence was not known to the solicitor in time to have introduced it earlier, it not appearing that defendants were denied the privilege of offering testimony in rebuttal if they had so desired.

APPEAL by defendants from *Burney, J.,* at September Term, 1949, of WILSON.

Criminal prosecution tried upon warrants charging the defendant Perry with reckless driving, transporting and illegal possession of nontax paid intoxicating liquors, and the defendant Cone with transporting and illegal possession of nontax paid intoxicating liquors, and also with aiding and abetting in the transportation and possession of nontax paid intoxicating liquors.

The cases were consolidated for the purpose of trial by consent.

The State's evidence tends to show that the defendant Perry was driving an automobile on one of the highways of the State, on the morning of 9 March, 1949, and passed the home of George Joyner, about two miles from the town of Wilson, traveling between 80 and 90 miles per hour. The car failed to make a slight curve in the highway near the Joyner home, went through the edge of Joyner's field and turned to the left into a drain or ditch parallel to the highway at a point where another ditch intersected the road ditch. The car came to rest in the ditch 270 feet from the point where it left the highway. The defendant Cone was with Perry at the time. Immediately after the wreck, these defendants were seen removing two pasteboard containers out of the car and taking them up the ditch. A highway patrolman was called from Wilson, and upon arriving at the scene of the wreck, according to his testimony, he found the front of the car wet with whiskey, and that he, in company with George Joyner, Joyner's son and the defendant Cone, followed tracks up the ditch and found a carton containing four gallons of nontax paid whiskey in the ditch about 100 feet from the car; they then followed the tracks about 175 feet further to a brush pile, where they found the second carton containing four gallons of nontax paid whiskey. There was other evidence as to the presence of broken jugs and glass jars in the ditch near

the car, which jars bore the same label as those which contained the eight gallons of whiskey found in the pasteboard cartons.

A witness for the defendants testified that he had left his truck on the Stantonsburg road the night before "when it had given out of gas" and that he had gone to the defendant Perry's home about 4:00 a.m., on the morning in question and that Perry took him to a filling station where he bought two gallons of gasoline in jugs to use in his truck.

Apparently this evidence was offered to explain the presence of the broken jugs near Perry's car. Whereupon the court made the following inquiries:

"Q. What time did you give out of gas the night before? A. .....

"Q. And you waited until 4:00 o'clock the next morning to get gasoline? A. Yes, sir.

"Q. You have known Arthur Perry how long? A. Ever since he was a kid.

"Q. You all go together, ride together, you are close friends? A. Just neighbors living close together.

"Q. Well, he was friend enough to get up at 4:00 o'clock and take you to your truck, wasn't he? A. Yes, sir."

Other questions were propounded to the filling station operator who sold the owner of the truck the two gallons of gasoline in jugs, which jugs were placed in defendant Perry's car. The court elicited the information from the witness that the defendant Perry drove a Ford car or a green Pontiac, and sometimes a two-tone gray Pontiac; that the witness only had three or four jugs that he used to carry gasoline. The court then inquired as to how long the odor of gasoline would remain in a jug and whether such jugs could be used thereafter for anything else. The witness testified that when the jugs were once filled with gasoline, they could not be used for anything but batteries, without washing them out which was "not too easy."

No objection was made during the course of the trial, to any of the questions propounded to the witnesses by the trial judge. Exceptions were taken after the trial and assigned as error.

The jury returned a verdict of guilty as to "both defendants as charged on each and every count."

From the judgments entered on the verdict, the defendants appeal and assign error.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Robert W. Jones for defendants.

DENNY, J. In the light of the evidence adduced in the trial below, we concur in the ruling of the trial judge in refusing to sustain the defendants' motions for judgment as of nonsuit, and the exceptions entered thereto are overruled. *S. v. Fentress,* 230 N.C. 249, 52 S.E. 2d 795; *S. v. Holbrook,* 228 N.C. 582, 46 S.E. 2d 842; *S. v. Turner,* 220 N.C. 437, 17 S.E. 2d 501; *S. v. Epps,* 213 N.C. 709, 197 S.E. 580; *S. v. Rhodes,* 210 N.C. 473, 187 S.E. 553; *S. v. Langley,* 209 N.C. 178, 183 S.E. 526; *S. v. Weston,* 197 N.C. 25, 147 S.E. 618; *S. v. Baldwin,* 193 N.C. 566, 137 S.E. 590.

The defendants seriously contend that the manner in which the trial judge examined the defendants' witnesses and the type of questions propounded to them, amounted to an expression of opinion by the court, in violation of G.S. 1-180, and the decisions thereunder, citing *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *S. v. Oakley,* 210 N.C. 206, 186 S.E. 244; *S. v. Bryant,* 189 N.C. 112, 126 S.E. 107, and *S. v. Jones,* 181 N.C. 546, 106 S.E. 817.

It is well settled in this jurisdiction that it is improper for a trial judge to ask questions for the purpose of impeaching a witness. Counsel may do so of any adverse witness, but this privilege does not extend to the trial judge. *S. v. Cantrell, supra; S. v. Bean,* 211 N.C. 59, 188 S.E. 610.

Moreover, questions propounded by the Court, as well as remarks made to or about a witness, which are clearly calculated to convey to the jury the impression that the testimony of the witness, in the opinion of the court, is probably unworthy of belief is error. And the fact that an exception was not entered at the time the question was propounded or the remark was uttered is immaterial. All expressions of opinion by the judge during the trial, like the admission of evidence made incompetent by statute, may be excepted to after verdict. *S. v. Bryant, supra.*

On the other hand, there are times in the course of a trial, when it becomes the duty of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked. But the trial judge should not by word or mannerism convey the impression to the jury that he is giving it the benefit of his opinion on the facts. *S. v. Harvey,* 214 N.C. 9, 197 S.E. 620; *S. v. Hart,* 186 N.C. 582, 120 S.E. 345. In the last cited case, *Stacy, C. J.,* in discussing this question, said: "It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone of the trial. The statute forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury." *S. v. Rogers,* 173 N.C. 755, 91 S.E. 854; *Morris v. Kramer,* 182 N.C. 87, 108 S.E. 381;

S. v. Winckler, 210 N.C. 556, 187 S.E. 792; *S. v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378.

It does not follow, however, that every ill-advised comment by the trial judge or question propounded by him which may tend to impeach the witness, is of such harmful effect as to constitute reversible error. The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless. Applying this criterion in the instant case, it is our opinion the evidence brought out by the court, when considered in the light of all the facts and attendant circumstances, disclosed by the record, was not of such prejudicial nature as to have had any appreciable effect on the result of the trial below. *S. v. Puett,* 210 N.C. 633, 188 S.E. 75; *S. v. Jones, supra; S. v. Browning,* 78 N.C. 555.

The defendants except and assign as error the ruling of his Honor in allowing the State to introduce additional evidence after the State and the defendants had rested their case the afternoon before. The evidence had a direct bearing on the defendants' connection with the two cartons of nontax paid liquors found in or near the ditch, referred to herein, by the highway patrolman and others. The existence of the evidence offered was not known to the Solicitor in time to have introduced it earlier. Moreover, it does not appear that the time of its introduction was prejudicial to the defendants, or that they were denied the privilege of offering testimony in rebuttal if they had so desired. It is discretionary with the presiding judge whether he will reopen the case and admit additional testimony after the conclusion of the evidence. *Miller v. Greenwood,* 218 N.C. 146, 10 S.E. 2d 708; *Ferrell v. Hinton,* 161 N.C. 348, 77 S.E. 224; *Dupree v. Insurance Company,* 93 N.C. 237; *S. v. Harris,* 63 N.C. 1. When the ends of justice require it, evidence may be offered even after the argument of counsel, *Williams v. Averitt,* 10 N.C. 308, or after the jury has retired, *S. v. Noblett,* 47 N.C. 418.

The additional exceptions have been carefully considered and they present no prejudicial error.

In the trial below we find

No error.

RUTH R. GORDON v. EVANS SPROTT, GOLDIE ZARO STARR AND ELIZABETH LYLE STARR, TRADING AS EAGLE THEATRE.

(Filed 1 March, 1950.)

1. Negligence § 11—

Plaintiff's negligence need not be the sole proximate cause of her injury in order to bar recovery, but it is sufficient for this purpose if it be one of the proximate causes thereof.

2. Negligence §§ 4f, 19c—Plaintiff's evidence held to show contributory negligence as matter of law barring recovery for fall in theatre aisle.

Plaintiff's action was based upon the negligence of defendant theatre in failing to properly light aisles in its balcony. Plaintiff's evidence tended to show that she voluntarily went to the balcony of the theatre, which she had visited before, and in going to her seat on the rear row of seats, stepped up the six inch elevation from the aisle to the floor upon which the seats were fastened, but that in leaving the theatre after the show, and after passing seats near the aisle which she saw to be vacant, she fell when she attempted to step into the aisle because there was insufficient light for her to see the difference in the floor levels. *Held:* Plaintiff's own evidence discloses contributory negligence constituting a proximate cause of her injury, and defendants' motion to nonsuit should have been allowed.

APPEAL by defendants from *Nettles, J.*, at Regular November Term, 1949, of BUNCOMBE.

Civil action to recover for alleged personal injury allegedly resulting from actionable negligence of defendants.

Plaintiff alleges in her complaint substantially these facts: That about 4 o'clock on afternoon of 5 February, 1949, she with her husband and their daughter, entered the Eagle Theatre, located on Eagle Street in the city of Asheville, as a paying guest and invitee of defendants; that observing that there were no seats available on the first floor of the theatre, she, and they, went to the balcony for seats; that when they reached the balcony they took seats on the first row of seats from the rear; that about two hours later after having seen the picture being featured at the time, and as defendants were showing dark scenes in their previews of coming attractions, she and her companions attempted to leave the theatre and as she attempted to step into the aisle from the row of seats on which she had been sitting, which was approximately seven inches higher than any other seats in the balcony, she was caused to fall and injure herself; that the rear row of seats, mentioned above, was elevated approximately seven inches higher than the aisle into which plaintiff was attempting to walk; that she had attended said theatre on other occasions prior to this but that she had always sat on seats other than said rear elevated seats, and, as she attempted to walk into the aisle on this occasion, she was taken by surprise when she found the aisle was not level with the

floor of the row of seats from which she was stepping, and was caused to fall violently to the floor inflicting serious and permanent injury to her great damage, etc., and that her fall was caused "by reason of the defendants negligently causing the theatre to be extremely dark in the position where plaintiff was attempting to walk, and by reason of the defendants' negligent failure to provide step lights, wall lights, or aisle lights projecting from the seats immediately adjacent to the aisle."

Defendants, answering, denied the allegations of the complaint in material aspect, and for further answer and defense pleaded: (1) That any injury plaintiff may have sustained resulted and arose solely from, and was proximately caused by her own careless, wrongful and heedless conduct in that (a) she voluntarily selected the seat in the last row in the balcony, whereas there were a large number of seats in other rows and other sections of the theatre available to her; and (b) she failed to keep a reasonable lookout upon leaving her seat in the row and stepping into the aisle, or failed to see the step of which she complains and which she could have seen in the exercise of reasonable care; and (2) that if defendants were negligent, the negligence of the plaintiff as above set forth was at least a concurring and contributing proximate cause, and is pleaded in bar of her right to recover in this action.

Upon the trial in Superior Court the evidence offered by plaintiff tended to show these facts: That "there are two aisles that go down the length of the theatre, on the ground floor, one on the right and one on the left, with seats on the . . . right of the right aisle, in the middle between the two aisles, and on the left of the left aisle." The balcony is reached from the lobby by stair steps. In the balcony there is an aisle on the left side between the ends of the rows of seats and the building wall. And there is an aisle back of the rear row of seats. The floor of the balcony is on level with the rows of seats, except the rear row of seats is on an elevation of six or seven inches above the level of the adjacent aisle.

And plaintiff and her daughter, 15 years of age, both testified in behalf of the plaintiff. Their testimony may be narrated in pertinent part as follows: The picture shows at the Eagle Theatre in the city of Asheville begin about three o'clock p.m. and run continuously until about eleven o'clock p.m. People come and go all the time, and were doing so on the afternoon of 5 February, 1949. On that afternoon plaintiff, accompanied by her husband and her said daughter, went to the theatre about four o'clock. They bought three tickets and entered. There were no seats available, none could be found, on the ground floor, and they went to the second floor, as plaintiff testified, and none were seen by the daughter when she looked from the right aisle,—she just took a glance, and did not see any close, and then they went to the balcony without doing anything more about seats downstairs because, using her language, "We

didn't want to sit down there so close to the picture. If there were vacant seats down on the first floor, they were too close to suit us."

Arriving at the balcony, it was dark. Plaintiff and her husband entered the last row of the balcony seats. The entrance to this row of seats is on the aisle between the end of the rows and the wall on the left-hand side. Plaintiff's husband found two seats, not together, on this row. Plaintiff testified that "As we went in my husband had me by the arm and he led me practically. It was so dark we couldn't see."

And, again, plaintiff testified, "When I got upstairs to the balcony, I knew how to go because I had been there before . . . It was dark, not pitch dark, but too dark to walk . . . My husband got me to the seat. I got up that little elevation all right with his help." Her seat was about middleways the rear row. Her husband pointed it out, and she got in it. There were more than four persons sitting on the same row to her left. The daughter says she sat in front of her father and mother. They, all, stayed there until 6:30 o'clock, when the picture they had come to see was finished. Plaintiff then got up to leave. As she was leaving, a colored cast was being shown on the screen. And she says "When I went to step out, come out, I just stepped right down in a hole . . . and fell . . ." She further says, "When I went into the place it was dark . . . It was darker coming out than it was going in . . . Some one was going out of the same row ahead of me . . . I didn't think, I was thinking too, but I knew there was a place there because I stepped up, but . . . I didn't see it and it was so dark. There was not any light and if there had been a light I could have seen it." The four people sitting to plaintiff's left did not get up to leave when she did, but those at the end of the row had done so. And plaintiff testified, "The condition of the balcony upstairs was known to me, but I had never sat in that seat before. I never had to sit in that seat before. I never had been no more than the third seat. I had been there it was two times and this was the third time . . . I noticed there was no light before I fell. I noticed before I went in that there was no light."

Plaintiff's daughter further testified: "After we had seen the picture, I got out first and Mother and Father followed in the back row. As we were coming out . . . this little step part was close to the first seat in the back row and when she stepped down she fell . . . There were no aisle lights there and there were no step lights. It was not very light in the balcony. As the picture was going off it was rather dark. It was not light. Before then it was light. You could see a little bit but when the picture was going off that throwed it to be rather dark up there in the balcony."

Then on cross-examination, plaintiff's daughter continued in pertinent part: "I know that there would be more than four seats between the

place where my mother was sitting and the aisle, on her left . . . My mother went out ahead of my father, coming out of the row of seats. To get out she had to slip between the knees of people sitting to her left, and the back of the row just ahead of her. She had to squeeze between those people . . . Sometimes when you have been in a picture show and sat there for two hours, your eyes become accustomed to the darkness and you can see better after you have been in there two hours than when you just got in. To my eyes, it was so that day . . . My mother has had trouble with her eyes before this happened. She used to wear glasses until she lost them."

When plaintiff first rested her case, defendants reserving exception to the denial of their motion for judgment as of nonsuit, offered evidence tending to contradict testimony of plaintiff as to visibility in the balcony, and other tending in part to elucidate that offered by plaintiff. Their evidence tended to show that there are five rows of seats in the balcony; that at the time there were 14 seats across in the back row in the balcony; and that the very back row in the balcony is elevated six inches so that the back row would not be on the same level with the row in front of it. And the manager of the defendants testified: "I have read advertisements of the modern and most approved lighting devices for theatres. I have been to a number of theatres. The modern and most approved devices for theatres is to have aisle lights at the end of each row of seats at the aisle. On February 5th, 1949, there in the afternoon I did not have aisle lights at the end of each row of seats there in that balcony."

Defendants' motions for judgment as of nonsuit entered at the close of all the evidence were denied, and they excepted.

The case was submitted to the jury upon three issues, relating first to negligence of defendants, second to the contributory negligence of plaintiff, and third, to damages. The jury answered the first "Yes," the second "No," and the third in specific amount. And from judgment on the verdict, defendants appeal to Supreme Court and assign error.

Sanford W. Brown and James W. Regan for plaintiff, appellee.
Smathers & Meekins for defendants, appellants.

WINBORNE, J. The assignments of error presented on this appeal pivot on the exceptions to the rulings of the trial court in denying defendants' motions, aptly made, for judgment as of nonsuit. If it be conceded that there is sufficient evidence to support a finding by the jury that defendants were negligent in the respects alleged, it is clear that, as a matter of law, upon plaintiff's own testimony, she was guilty of negligence which was at least a proximate cause of the injury of which she complains. If a plaintiff's negligence is one of the proximate causes of the injury, it is

sufficient to defeat recovery. It need not be the sole proximate cause. *Moore v. Boone, post,* 494; *Fawley v. Bobo, ante,* 203, 56 S.E. 2d 419; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623, and numerous other cases.

Moreover, "In general a theater patron who was injured in a darkened theater must have exercised ordinary care for his own safety, and if he failed to do so he cannot recover notwithstanding the negligence of the theater operator." 143 A.L.R. 61, Annotation III (a).

And "Where a person *sui juris* knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence, which will bar his recovery." *Dunnevant v. R. R.,* 167 N.C. 232, 83 S.E. 347; *Groome v. Statesville,* 207 N.C. 538, 177 S.E. 638.

Applying these principles to the case in hand, and bearing in mind the allegations of negligence, limited to lack of light and lighing facilities, upon which she bases her cause, it is seen: Plaintiff voluntarily went to the balcony of the theatre. When she reached there, she "knew how to go" because she "had been there before,"—twice, she says. The condition of the balcony was known to her, though she had not "sat in that seat before." She knew that the rear row of seats was on an elevated plane, for, in entering, she says "I got up that little elevation all right." Again, she says, "I knew there was a place there because I stepped up." And when she entered the balcony she noticed "there was no light," and before she fell she noticed "there was no light." But in coming out it was light enough for her to see that those persons on the end seats of the rear row, that is, those next to the aisle, had gone out. Thus she knew or by the exercise of ordinary care she should have known that as she approached the end of the row, she was approaching the place of the elevation of which she knew.

And it may be noted that while plaintiff speaks of stepping into a hole, the allegations of her complaint, and her own testimony show clearly that it was no more than the space below the plane of the rear row of seats, where she sat, and the level of the aisle floor. And such is not alleged as negligence.

This case is distinguishable in factual situation from the cases of *Drumwright v. Theatres, Inc.,* 228 N.C. 325, 45 S.E. 2d 379, and *Mulford v. Hotel Co.,* 213 N.C. 603, 197 S.E. 169, on which plaintiff, as appellee, relies, and is not controlled by the decisions there.

For reasons here stated, defendants' motions for judgment as of nonsuit should have been allowed. Hence, the judgment below is

Reversed.

CHARLES HENRY, EMPLOYEE, v. A. C. LAWRENCE LEATHER COMPANY, EMPLOYER, AND SECURITY MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 1 March, 1950.)

1. Master and Servant § 50—

Claimant in a proceeding under the Workmen's Compensation Act has the burden of proving that his claim is compensable under the Act.

2. Master and Servant § 51—

The Industrial Commission is the sole judge of the truthfulness and weight of the testimony of the witnesses in the discharge of its function as the fact finding authority under the Workmen's Compensation Act. G.S. 97-84.

3. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive upon appeal when supported by competent evidence.

4. Same—

On appeal from an award of the Industrial Commission the jurisdiction of the courts is limited to the questions of law as to whether there was competent evidence before the Commission to support its findings of fact and whether such findings justify the legal conclusions and decision of the Commission.

5. Master and Servant § 40f—

Only those occupational diseases specifically designated by G.S. 97-53, as amended, are compensable under the Workmen's Compensation Act.

6. Same—

A dermatitis resulting from contact with gloves made of commercial rubber is not an occupational disease compensable under the Workmen's Compensation Act. G.S. 97-53 (13).

7. Master and Servant § 37—

The rule that the Workmen's Compensation Act should be liberally construed cannot be employed to contribute to a provision of the Act a meaning foreign to the plain and unmistakable words in which it is couched.

APPEAL by defendants, A. C. Lawrence Leather Company and Security Mutual Casualty Company, from *Moore, J.*, at November Term, 1949, of HAYWOOD.

This is a proceeding under the North Carolina Workmen's Compensation Act in which the plaintiff, Charles Henry, seeks compensation from his employer, A. C. Lawrence Leather Company, and its insurance carrier, Security Mutual Casualty Company, for an alleged occupational disease. The parties concede that they are bound by the provisions of the Act.

The plaintiff offered testimony before the Hearing Commissioner tending to show that he handled "green hides" saturated with lime water in performing his work in the tannery operated by his employer; that in so doing he protected his hands from injury by the lime water by wearing gloves, which were furnished by his employer for the purpose and which were made of commercial rubber, a definite and solid substance produced by combining natural rubber and "chemicals," some of which were gaseous or liquid in form at certain stages in the process of manufacture; that although he was unaware of the fact, he was allergic "to all types of rubber" and "to no other substance"; and that in consequence the contact of his hands and the gloves caused a dermatitis, *i.e.*, an inflammation of his hands and arms, which totally disabled him to work during the period from 5 April, 1948, to 12 July, 1948.

The Hearing Commissioner made general findings of fact conforming to this testimony and this additional specific finding: "That as a result of wearing the rubber gloves above mentioned the plaintiff became sensitive to said solidified chemical compounds contained in the rubber gloves and as a result of wearing them suffered a dermatitis of the hands and arms, from which he was totally disabled for the period from April 5, 1948, to July 12, 1948." The Hearing Commissioner thereupon declared that "the Supreme Court has consistently held that the provisions of the Workmen's Compensation Act should be construed liberally in awarding compensation" and concluded as a matter of law on the basis of his specific finding of fact that the thirteenth subdivision of G.S. 97-53 "is sufficiently broad to cover an occupational dermatitis caused by wearing rubber gloves which are a chemical compound which was originally chemical liquids, gases, or vapors and which had become solidified"; and awarded plaintiff compensation "for temporary total disability for the period from April 5, 1948, to July 12, 1948."

The award of the Hearing Commissioner was reviewed by the Full Commission on the appeal of the defendants, and the Full Commission adopted as its own "the findings of fact, conclusions of law, and the award of the Hearing Commissioner." The defendants thereupon appealed from the Full Commission to the Superior Court, and the Superior Court entered judgment affirming the conclusions of law and award of the Full Commission. The defendants excepted to this judgment, and appealed therefrom to this Court, assigning errors.

R. E. Sentelle for plaintiff, appellee.

Morgan & Ward for defendants, appellants.

ERVIN, J. The following rules are well settled in respect to proceedings coming within the purview of the North Carolina Workmen's Compensation Act:

1. The claimant has the burden of proving that his claim is compensable under the Act. *Bolling v. Belk-White Co.*, 228 N.C. 749, 46 S.E. 2d 838; *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137; *Gassaway v. Gassaway & Owen, Inc.*, 220 N.C. 694, 18 S.E. 2d 120; *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324.

2. Fact-finding authority is vested in the North Carolina Industrial Commission, which is the sole judge of the truthfulness and weight of the testimony of the witnesses. G.S. 97-84; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515.

3. The findings of fact of the Industrial Commission are conclusive and binding upon appeal to the courts if such findings are supported by competent evidence, the jurisdiction of the courts being limited to questions of law. *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668; *Winslow v. Carolina Conference Association*, 211 N.C. 571, 191 S.E. 403; *Byrd v. Lumber Co.*, 207 N.C. 253, 176 S.E. 572.

4. In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision. 58 Am. Jur., Workmen's Compensation, section 530.

The North Carolina Workmen's Compensation Act does not cover all occupational diseases. Schneider's Workmen's Compensation (Perm. Ed.), Text Volume 3, section 924; Horovitz on Workmen's Compensation, page 85. It makes compensable disablements or deaths of employees resulting from a limited number of occupational diseases, *i.e.*, those specifically designated in the twenty-six subdivisions of G.S. 97-53 as amended by Chapter 1078 of the 1949 Session Laws of North Carolina. G.S. 97-52.

The plaintiff insists that the judgment of the Superior Court upholding the award of the Industrial Commission ought to be sustained on the ground that his disabling dermatitis is compensable as an "infection or inflammation of the skin . . . due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors" within the meaning of the thirteenth subdivision of G.S. 97-53. He rightly concedes that his ailment cannot qualify as an occupational disease under any other provision of the statute.

The defendants assert, however, by appropriate exceptions to findings of fact, conclusions of law, and the award itself, that the plaintiff has failed to prove that his disabling dermatitis falls within the coverage

of the thirteenth subdivision of the statute. They advance two contentions to invalidate the award of the Industrial Commission and the judgment of the Superior Court affirming it. These are: (1) That there was no evidence before the Commission supporting its specific finding of fact that the dermatitis suffered by plaintiff was caused by "solidified chemical compounds contained in the rubber gloves"; and (2) that such finding of fact, even if supported by evidence, is insufficient to justify the legal conclusion and the decision that the dermatitis suffered by plaintiff qualifies as a compensable occupational disease under the Workmen's Compensation Act.

The evidence before the Commission did not suggest that the plaintiff had an allergy to some undefined chemicals, even though such chemicals may have been gases or liquids before they were combined with natural rubber to form commercial rubber. It was simply that the plaintiff is allergic "to rubber in all its forms and to no other substance." Thus, it appears that there is much persuasiveness in the first position assumed by the defendants.

Be that as it may, the validity of their second contention admits of no reasonable doubt. A dermatitis resulting from contact with gloves made of commercial rubber, which is a definite and solid substance, cannot be adjudged to be "due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases, or vapors" without doing violence to the language employed by the Legislature to express its intent.

It is undoubtedly true that the Workmen's Compensation Act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation." *Johnson v. Hosiery Company,* 199 N.C. 38, 153 S.E. 591. But the rule of liberal construction cannot be employed to attribute to a provision of the Act a meaning foreign to the plain and unmistakable words in which it is couched. *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907; *Gilmore v. Board of Education,* 222 N.C. 358, 23 S.E. 2d 292.

For the reasons given, the judgment of the Superior Court sustaining the award of the Industrial Commission is

Reversed.

STELLA E. PENN; E. S. PENN AND WIFE, BERNICE S. PENN; FRANK REID PENN AND WIFE, ROBERTA W. PENN; C. A. PENN, JR., AND WIFE, ANN EDMUNDS PENN; AND VIRGINIA ANN PENN WETTLAUSER AND HUSBAND, C. TAYLOR WETTLAUSER, v. THE CAROLINA VIRGINIA COASTAL CORPORATION AND THE CAROLINA VIRGINIA COASTAL HIGHWAY.

(Filed 1 March, 1950.)

1. Pleadings § 15—

The facts alleged in the pleading will be taken as true upon demurrer.

2. Eminent Domain § 3—

The mere threat to take a right of way under the power of eminent domain and an isolated act in going upon the land in making a preliminary survey, are insufficient to constitute a "taking." G.S. 40-3.

3. Eminent Domain § 22—

The owner of land may not maintain a proceeding for the assessment of damages under G.S. 40-12 until there has been a taking of his property under the power of eminent domain, and demurrer to the petition is properly sustained when its allegations amount to no more than that respondent had threatened to take an easement and had made preliminary surveys incidental thereto, since in such instance the petition fails to allege a taking of the property. Chap. 1024, Session Laws of 1949.

APPEAL by petitioners from *Nimocks, J.*, at September Term, 1949, of CURRITUCK.

Special proceeding to assess and recover "damages that will be sustained by the petitioners for the taking" of that part of right of way for toll road over lands of petitioners in Currituck County, North Carolina, etc., "in accordance with the General Statutes of North Carolina, Chapter 40, Article 2," heard upon demurrer to the petition filed by defendants.

The petition contains these pertinent allegations:

That pursuant to the authority granted in an act of the General Assembly of North Carolina entitled "An Act to Authorize the Organization of Municipal Corporations for the Purpose of Constructing and Operating Toll Roads," enacted at the 1949 Session (Senate Bill No. 356, now Chapter 1024 of 1949 Session Laws of North Carolina), the North Carolina Municipal Board of Control has created, by order issued as by law provided, a municipal corporation, The Carolina-Virginia Coastal Highway, herein referred to as the Coastal Highway, one of the defendants in this action.

"5. That the petitioners are the owners and possessors, as tenants in common, of a certain tract of land known as 'Monkey Island,' comprising several islands lying and being in Currituck Sound, and certain tracts of land lying and being on the Outer Banks, of Currituck County, de-

scribed in a deed," as there specified; and "that included in the said property is a portion of the Outer Banks of Currituck County having a total length, along the said Outer Banks, of 10,500 feet, more or less.

"6. That the Coastal Highway, although a municipal corporation, is the *alter ego* of the Corporation, a private corporation, in that the principal power and purpose of the latter is the sole power and purpose of the former, *i.e.*, the construction and operation of a turnpike or toll road from a point on U. S. Highway #158 to the Virginia line, along the Outer Banks of Dare and Currituck Counties, said toll road to connect with a toll road to be built by a Virginia corporation from the Virginia line to Virginia Beach, Virginia; and in that the principal proponents, organizers, interested persons, or *entrepreneurs* of the one corporation are the same persons, or principally the same persons, who are the principal proponents, organizers, interested persons, or *entrepreneurs* of the other corporation.

"7. That the engineers of the corporations have surveyed the proposed right-of-way along the Outer Banks of the said counties, and have set their survey marks and stakes thereon.

"8. That your petitioners have endeavored to reach a satisfactory agreement with the Corporation and with the Coastal Highway for the granting and conveying of an easement for that portion of the surveyed right-of-way lying upon the lands of the petitioners.

"9. That, despite the efforts and entreaties of the petitioners, the defendant corporation refused to negotiate such agreement for the said right-of-way and your petitioners are absolutely unable to come to any understanding with said defendants as to the compensation to be paid for said easement and damages to the remainder of the lands of the petitioners.

"10. That the surveyed right-of-way, or some nearby right-of-way over the lands of the petitioners, is required for the construction of the said toll road; that the said defendants, or either of them, cannot carry out the purpose or principal purpose for which they were formed or chartered without taking such right-of-way across the lands of the petitioners, or acquiring an easement for such right-of-way.

"11. That your petitioners are informed and believe that the defendants are having and will have great difficulty in financing the construction and operation of the said toll road; that if the said right-of-way across the lands of petitioners is taken without the compensation for the taking being previously determined and paid into the court, pending any appeal made by either party, or paid to your petitioners if there is no appeal by either party, it is likely that such taking will result in depriving your petitioners of valuable property, or rights therein, contrary to

provisions of the Constitution of North Carolina and the Constitution of the United States of America.

"12. That the said defendants are threatening to take the said right-of-way, and the compensation due the petitioners from the defendants should be determined as by law provided."

The defendants demurred to the said petition upon the ground that it fails to state a cause of action against defendants for that, among other things, the right of the owner of land to maintain an action under the Eminent Domain Statute, Article 2 of Chapter 40 of General Statutes, particularly G.S. 40-12, is necessarily predicated upon an unauthorized trespass and an illegal taking of the owner's lands without the institution of such a condemnation proceeding on the part of the corporation, and the mere prophecy by petitioners that their lands will be taken is not sufficient legal basis for the maintenance of an action of this nature.

And the court, upon hearing had on the demurrer, being of opinion that it should be sustained, entered an order in accordance with such opinion. Petitioners appeal therefrom to the Supreme Court and assign error.

Frank B. Aycock, Jr., and Frank P. Hobgood for petitioners, appellants.

Harry McMullan, Jr., for defendants, appellees.

WINBORNE, J. Taking the facts alleged in the petition to be true, as is done in a civil action in this State, in considering the sufficiency of a pleading to withstand the challenge of demurrer, and applying applicable principles of law, the court properly held that the allegations of the petition are insufficient to state a cause of action.

The Act of the General Assembly of 1949, Chapter 1024 of 1949 Session Laws of North Carolina, authorizes the creation of and prescribes the machinery by petition for creating a municipal corporation for the purpose of acquiring rights of way for and owning and operating a toll road or highway in this State in the public interest. The Act also provides in Section 6 that such municipal corporation, when so created and organized in the manner prescribed, is "authorized and empowered to lay out, open up, own and construct and operate a toll road over the route designated in the petition." And the Act further provides in Section 7 that: "In the event the said municipal corporation is unable to agree with the owner of the land across whose land a toll road or highway is to be constructed as to the acquisition of the right of way across such land for the use and operation of the said toll road, the said municipal corporation shall have the right to acquire such easement and the

right of way by eminent domain upon compliance with the provisions of the Public Works Eminent Domain Law, set forth in Article 3 of Chapter 40, of the General Statutes . . . or such right of way may be condemned in accordance with the provisions of Article 2 of Chapter 40 of the General Statutes of North Carolina."

Thus it appears that the corporation is given the choice of remedies in the event it is unable to agree with the landowner.

And in the present action the petitioners, owners of the land, have undertaken to chart the course, on the theory that they, as owners of the land, may proceed under the provisions of Article 2 of Chapter 40 of the General Statutes of North Carolina. But it appears that petitioners have, in athletic parlance, "jumped the gun," that is, started this proceeding before their right to do so has accrued.

In this connection it is provided in Article 2 of Chapter 40 of the General Statutes, G.S. 40-11, that "if any corporation, enumerated in G.S. 40-2, possessing by law the right of eminent domain in this State is unable to agree for the purchase of any real estate required for the purposes of its incorporation, or for the purposes specified in this Chapter, it shall have the right to acquire title to the same in the manner and by the special proceedings herein prescribed." In the next Section, G.S. 40-12, it is declared that "for the purposes of acquiring such title the corporation, or the owner of the land sought to be condemned, may present a petition to the clerk of the Superior Court in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal." Thus it is clear that the corporation may proceed to put into execution the machinery for acquiring title to the land it seeks to condemn. But the statute does not state when "the owner of land sought to be condemned" may proceed to have the land appraised, etc. However, the right to have such appraisal must necessarily be predicated upon a taking of the property by the corporation possessing the right of eminent domain. And "taking" under the power of eminent domain may be defined as "entering upon private property for more than a momentary period, and, under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." 18 Am. Jur. 756, Eminent Domain, Sec. 132.

Moreover, "what is a taking of property within the due process clause of the Federal and State constitutions," the text writers say, "is not always clear, but so far as general rules are permissible of declaration on the subject, it may be said that there is a taking when the act involves an actual interference with, or disturbance of property rights, resulting

in injuries which are not merely consequential or incidental." 18 Am. Jur. 757, Eminent Domain, Sec. 132.

Applying these principles to the allegations of the petition, challenged by demurrer, it is seen that petitioners do not allege a taking of their property by defendant Coastal Highway. The most that is alleged is that if the defendant Coastal Highway constructs a toll road or highway along the route for which it was created, the road will cross the land of petitioners, and that "defendants are threatening to take the said right of way." A threat to take, and preliminary surveys, G.S. 40-3, are insufficient to constitute a taking on which a cause of action for a taking would arise in favor of the owner of the land.

Affirmed.

IN THE MATTER OF THE ESTATE OF JOHN PITCHI, DECEASED.

(Filed 1 March, 1950.)

1. Clerks of Court § 4—

The clerk of the Superior Court when acting as probate judge is a court of general jurisdiction in respect to probate matters.

2. Same: Executors and Administrators § 2a—

The jurisdiction of the clerk as probate judge is invoked by petition disclosing the requisite jurisdictional facts filed by some person entitled to qualify as executor or administrator. G.S. 28-1, G.S. 28-6.

3. Executors and Administrators §§ 2a, 2c—

The giving of bond is not essential to the efficacy of the appointment of an executor or administrator by the probate judge, but the failure to give bond is an irregularity which renders the letters of administration voidable.

4. Executors and Administrators § 3—

Where letters of administration have been issued by the probate judge they are not subject to collateral attack.

5. Same—

Where, upon service of order to show cause why letters of administration should not be revoked for failure of the administrator to give bond, the administrator files bond with sufficient surety which is approved by the clerk, the irregularity is cured and the denial of the motion to vacate the letters of administration is not error.

APPEAL by petitioner from *Bone, J.*, in Chambers at Nashville, N. C., 19 November 1949, WILSON. Affirmed.

Administration of the estate of an intestate, heard on motion to revoke and vacate the letters of administration.

IN RE ESTATE OF PITCHI.

John Pitchi died intestate 6 July 1948. On 13 September 1948, Nelson Pitchi was appointed administrator of his estate, and letters of administration were issued. No administration bond was executed, tendered to, or accepted by the clerk. The administrator instituted an action against Bogue Sound Club, Inc., under the wrongful death statute. Thereupon, said corporation petitioned the clerk for a rule to show cause why said letters should not be vacated. The rule was issued and served upon the administrator. The administrator then filed with the clerk an administrator's bond which was approved and accepted by the clerk.

When the rule to show cause came on to be heard, the clerk found the facts and, upon the facts found, adjudged that Pitchi was and is the duly appointed, qualified, and acting administrator of the estate of John Pitchi, and denied the motion to vacate. The petitioner appealed to the judge of the Superior Court. The judge, upon hearing the appeal, affirmed the judgment of the clerk, and petitioner appealed to this Court.

Connor, Gardner & Connor for petitioner appellant.

Charles B. McLean and F. L. Carr for respondent appellee.

BARNHILL, J. The orderly administration of the estates of decedents is a necessary incident to the devolution of property by inheritance or under testamentary devise. Such administration is a matter of public interest and is regulated by law. Under our statute jurisdiction is vested in the clerk of the Superior Court acting as probate judge. When so acting, his court, in respect to probate matters, is a court of general jurisdiction.

His jurisdiction is invoked by application or petition by some person entitled to qualify as administrator or executor, G.S. 28-6, in which the requisite jurisdictional facts, G.S. 28-1, are made to appear. *Batchelor v. Overton,* 74 S.E. 20; *Holmes v. Wharton,* 194 N.C. 470, 140 S.E. 93; *Brooks v. Clement Co.,* 201 N.C. 768, 161 S.E. 403.

While the administrator is required to give bond for the faithful performance of the trust reposed in him, GS. 28-34, the authority of the probate judge to appoint does not rest on the bond. That is merely a question going to the manner of qualifying under the appointment. 21 A.J. 449, sec. 126.

"The giving of the bond, though required, is not essential to the efficiency of the act of appointment itself." *Howerton v. Sexton,* 104 N.C. 75; *In re Wiltsey's Will,* 109 N.W. 776; *Beresford v. Coal Co.,* 98 N.W. 902, 70 L.R.A. 256; *Leatherwood v. Sullivan,* 81 Ala. 458; 21 A.J. 449, sec. 126; 33 C.J.S. 988; 2 Amer. Law of Administration 836, sec. 253.

When the appointment has been made and letters of administration have been issued, the letters are valid. "The failure to give a bond or the

giving of an insufficient bond is only an irregularity, in no way affecting the validity of the appointment." *Batchelor v. Overton, supra; Hughes v. Hodges,* 94 N.C. 56.

The irregularity makes the letters of administration voidable only—a condition which may be cured by full compliance with the statute. *In re Wiltsey's Will, supra.* The conclusion that this is true is implicit in the uniform decisions in this and other jurisdictions to the effect that such letters once issued are not subject to collateral attack, *Batchelor v. Overton, supra; Tyer v. Lumber Co.,* 188 N.C. 274, 124 S.E. 306; *Brooks v. Clement Co., supra,* for a void order or decree is *coram non judice* and may be attacked whenever and wherever it is asserted. *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311.

Of course the issuance of letters of administration without first requiring a good and sufficient bond is a serious irregularity. Whenever such inadvertence is called to the attention of the clerk he should promptly demand bond, in default of which he should recall and revoke the letters of administration. In the meantime, his official bond is liable for any *devastavit* occurring prior to the filing of a bond. *Plemmons v. R. R.,* 140 N.C. 286.

Here a bond with sufficient surety has been tendered to and accepted and approved by the clerk. As the only asset of the estate is the claim for damages for wrongful death, the bond, for the time being, is sufficient in amount. Upon a recovery in the pending suit the clerk may and should require additional bond commensurate with the amount of recovery. In the meantime the respondent is fully authorized to act as administrator of his intestate's estate.

In re Will of Winborne, ante, p. 463, is clearly distinguishable. In an administration, compliance with the statute in respect to bond is procedural while in a caveat proceeding it is jurisdictional. In an administration, jurisdiction is invoked by an application for the appointment of an executor or administrator. In a caveat proceeding authority to act vests in the clerk only "when a caveator shall have given bond" or otherwise complied with the statute in respect thereto.

For the reasons stated the judgment below is

Affirmed.

HETTIE S. PERKINS v. E. P. SYKES.

(Filed 1 March, 1950.)

Appeal and Error § 2—Appeal in this case dismissed as premature.

Where plaintiff institutes action for an accounting with defendant upon allegation that she and defendant were partners, together with causes of action for recovery of amounts alleged to have been loaned or entrusted to defendant, and defendant denies all liability to plaintiff and sets up a cross-action asserting that plaintiff's title to one-half the business property was as a trustee for defendant, and the jury, by reason of disagreement, is unable to answer four of the six issues submitted and judgment is entered upon the two issues answered adjudicating that the parties are partners and that plaintiff's title to part of the business property was free from the asserted trust, but postpones the taking of an accounting of the partnership affairs, *held* the judgment is a partial one and an appeal therefrom is dismissed as fragmentary and premature.

APPEAL by defendant from *Nimocks, J.*, and a jury, at the May Term, 1949, of ORANGE.

Certain events antedating this litigation are not in dispute. They are set out in the next three paragraphs.

From 27 March to 6 September, 1946, the defendant and Paul J. Reeves operated an automobile sales agency and service station in Hillsboro, North Carolina, under the trade name of Reeves Motor Company. They had identical interests in the business, and conducted it upon a lot which they owned in equal shares as tenants in common. Prior to 6 September, 1946, the plaintiff delivered two sums, to wit: $2,500.00 and $500.00 to the defendant, who is her brother.

On or about 6 September, 1946, Paul J. Reeves executed and delivered to the plaintiff for a valuable consideration a bill of sale and a deed sufficient in form to vest in the plaintiff his entire interest in the assets and business of the Reeves Motor Company, and in the lot used for the undertaking. The name of the enterprise was thereupon changed to the E. P. Sykes Motor Company. Since that time the defendant has actively managed the entire business.

On 21 March, 1947, the plaintiff took title to an Oldsmobile sedan from the E. P. Sykes Motor Company, and at the same time borrowed $1,852.50 from the M & J Finance Company of Durham, North Carolina, which was paid on the purchase price of the automobile. On various subsequent occasions the plaintiff delivered sums of money to the defendant upon an agreement that he would transmit them to the M & J Finance Company for application to the plaintiff's debt to it.

This action was begun on 15 October, 1947. Although it does not state them separately, the complaint sets forth three different causes of action.

The first cause of action alleges that the sums of $2,500.00 and $500.00 advanced to defendant by plaintiff before 6 September, 1946, constituted loans; that the defendant had breached his contract to repay such loans to plaintiff; and that plaintiff is entitled to recover such loans of defendant.

The second cause of action asserts that subsequent to 21 March, 1947, the plaintiff delivered sums totaling $1,166.00 to defendant, who agreed to transmit them to the M & J Finance Company for application to the debt of the plaintiff to the Finance Company; that the defendant had breached this agreement with plaintiff by withholding $548.50 out of these sums; and that plaintiff is entitled to recover the amount so withheld of defendant.

The third cause of action states that the plaintiff and the defendant have been equal partners in the E. P. Sykes Motor Company since 6 September, 1946; that the defendant has wrongfully usurped complete control of the business and property of the partnership, and "is appropriating all of the earnings to his own use"; and that plaintiff is entitled to a dissolution of the partnership and an accounting with respect to its affairs.

The defendant answered, denying all liability to plaintiff and pleading a cross-action against her. He avers that the sums involved in the first cause of action were gifts and not loans; that he had faithfully transmitted to the M & J Finance Company all sums entrusted to him by plaintiff for that purpose; and that no partnership had ever existed between him and the plaintiff with respect to the business and property of the E. P. Sykes Motor Company. The cross-action alleges that the plaintiff took legal title to the property described in the bill of sale and deed from Paul J. Reeves as a trustee for the defendant, and prays a decree so adjudging.

Trial began on Monday morning and ended at ten o'clock on the ensuing Friday night. The parties offered voluminous testimony in support of their respective pleadings. These issues were submitted to the jury:

1. Were the sums of $2,500.00 and $500.00 loaned to the defendant by plaintiff, as alleged in the complaint?

2. In what amount, if any, is the defendant indebted to the plaintiff?

3. Did the plaintiff pay any sums to defendant for payments to be made on the Oldsmobile automobile which defendant failed to pay thereon?

4. What amount, if any, is the defendant indebted to plaintiff on said automobile payments?

5. Have plaintiff, Hettie S. Perkins, and defendant, E. P. Sykes, been partners in the E. P. Sykes Motor Company since 6 September, 1946, as alleged in the complaint?

6. Is the plaintiff trustee for defendant holding the title to one-half interest in the land, filling station and personal property, as alleged in the further answer?

After protracted deliberations, the jury returned into open court with the fifth issue answered "Yes," the sixth issue answered "No," and the other issues unanswered. The jury announced that it had agreed upon the fifth and sixth issues, and tendered its answers to these issues to the court as its verdict thereon. At the same time, the jury advised the court that it was hopelessly deadlocked upon the other issues. The court thereupon accepted the answers of the jury to the fifth and sixth issues as its verdict thereon, caused them to be recorded on the minutes as such, and declared a mistrial as to the first, second, third, and fourth issues, which it ordered to be tried anew before another jury at a later term.

The court entered a judgment on the basis of the findings on the fifth and sixth issues making these adjudications: (1) That plaintiff and defendant "have been equal partners in the E. P. Sykes Motor Company since September 6, 1946, until the present time"; (2) that the plaintiff "is entitled to a full accounting of all transactions had by the E. P. Sykes Motor Company since September 6, 1946, until the present time"; and (3) that the plaintiff "is the holder of the title to one-half interest in the land described in the complaint, the filling station and personal property in her sole right and interest."

The defendant excepted and appealed, assigning errors.

A. H. Graham and L. J. Phipps for plaintiff, appellee.

J. Grover Lee and R. M. Gantt for defendant, appellant.

ERVIN, J. The judgment adjudicates the issue raised by the defendant's cross-action, *i.e.*, the title to the real and personal property used in carrying on the business of the E. P. Sykes Motor Company. It also judicially declares the right of the plaintiff to have an accounting of the partnership affairs in conformity to the prayer of the third cause of action stated in the complaint. But it leaves the first and second causes of action set out in the complaint wholly untried, and postpones the actual taking of the account of the partnership affairs to a later occasion.

For these reasons, the judgment is a partial one, not disposing of the whole case. In consequence, the appeal is fragmentary and premature, and must be dismissed. *Cole v. Trust Co.*, 221 N.C. 249, 20 S.E. 2d 54; *Garland v. Improvement Co.*, 184 N.C. 551, 115 S.E. 164; *Cement Co. v. Phillips*, 182 N.C. 437, 109 S.E. 257; *Hinton v. Ins. Co.*, 116 N.C.

22, 21 S.E. 201; McIntosh on North Carolina Practice and Procedure in Civil Cases, section 676 (7).

When the whole action is tried, an appeal will lie from the final judgment upon the whole controversy. *Cement Co. v. Phillips, supra.*

Appeal dismissed.

HAYES HIGHTOWER, INFANT AND MINOR, BY HIS NEXT FRIEND, LUTHER HIGHTOWER, v. MACK B. THOMPSON, BURLINGTON, N. C.

(Filed 1 March, 1950.)

1. Arrest and Bail § 8—

The liability on an appearance bond upon its forfeiture by nonappearance of the accused is the penal sum of the bond and not the fine or costs, the costs being deductible from the amount of the bond solely to ascertain the clear proceeds for the use of the public school fund.

2. Extortion § 2—

The evidence tended to show that plaintiff had been found guilty *in absentia* upon a plea entered by plaintiff's brother-in-law, that the justice of the peace agreed that the fine might be paid the following week upon the agreement of plaintiff's bondsman to "stay on his bond," that payment not having been made, the justice of the peace notified the bondsman and issued him a capias upon request, and that the bondsman under threat of arrest extracted a sum several times the amount of the fine from plaintiff and the next day paid the amount of the fine into court. *Held:* Nonsuit in plaintiff's action for extortion was erroneously granted.

PLAINTIFF'S appeal from *Clement, J.*, November Term, 1949, CASWELL Superior Court.

The plaintiff, a minor, 17 years of age, brings this action by his next friend, (Luther Hightower, his father), to recover from the defendant money which he claims was wrongfully extorted from him by threats and misrepresentations of the defendant, Mack B. Thompson, in the sum of $52.00, and for punitive damages in the sum of $5,000. The complaint setting up the cause of action was duly filed and material portions thereof answered. When the case came on for a hearing the defendant demurred to the complaint and moved to dismiss the action on the ground that the complaint did not set up any cause of action. The demurrer was overruled and the court proceeded with the hearing.

It appears from the evidence that on September 11 the defendant Thompson approached the plaintiff Hayes Hightower while the latter was in jail in Alamance County under a charge of public drunkenness and offered to sign for him an appearance bond, in the penal sum of $25.00, for his appearance before C. C. Bayliff, J.P., on September 17,

at 7:30 p.m. He did not appear at that time, but got his brother-in-law, Walter Ellison, to go and "plead him guilty," and settle the matter. Bayliff accepted the plea, found Hightower guilty, *in absentia,* and after consulting with the bondsman, Thompson, who agreed to "stay on his bond," agreed that "Hightower might send the money the following week," not naming any certain day.

The money not coming in during the week allowed, Thompson was notified of the default and on October 7 applied for and received a capias for the arrest of the plaintiff and proceeded to his home at Yanceyville in Caswell County, and there saw the defendant's mother, whom he told that the boy was in trouble and he had come for the boy or the money. She had no money. Thompson and Charlie Kimber went to the schoolhouse in Yanceyville where the plaintiff was in school, and Thompson called for Hightower.

After a talk with Prof. Dillard, the Superintendent, Thompson returned to his car and was followed shortly by Hayes Hightower. What occurred is best described in the testimony of the plaintiff:

> "At the school grounds I saw him down at the road in an automobile. I went out to see him. He told me he had come to see about the trouble I got in, and I told him I had paid for it, and he said you haven't paid either, and I told him to come to the house with me and then we went over to the barn and my brother give me $50.00 and I paid him $52.00. He said I owed him $60.00 and finally come down to $55.00 and then at last to $52.00, and that is what I paid him. I was afraid he would take me to jail. He said if I didn't pay him he would get the sheriff and arrest me. I live about 15 miles from Yanceyville. I can't recollect what statements he made to my brother and mother. When I gave him the $52.00 he wrote something on a paper and gave me this paper."

The plaintiff said he did not owe Thompson anything or anything on fine and cost when the demand was made on him and so told Thompson, but paid him the $52.00 in fear of arrest. Upon this payment Thompson marked on the back of the paper (which he had held in his hand at the colloquy at the schoolhouse) "Paid in full. Mack"; and delivered it to Hightower. The paper turned out to be the capias above mentioned.

On cross-examination the witness stated that, "Thompson told me that he had been to court that day and nobody came in or paid him anything. Then he told me that he had this paper in his hand and I would have to be brought back unless I paid off the fine and costs. He did not tell me the magistrate said if I wanted to pay off the fine and costs it would be $13.35. I did not read it. I am in the 11th grade. I didn't read the papers; he didn't give me time . . . He did not tell me he had scoured

all over the country for me trying to find me for two days right then and there . . . I left Mack and went off in a car and got some money and came back and paid Mack $52.00. He told me what these different things were for and I told him that was all right and I was glad to get it settled."

Thompson left with the sheriff on the night of the 7th $13.95 to be paid on the fine and costs.

On the following morning the brother-in-law of plaintiff appeared at the office of the Justice of the Peace, insisting that he receive the fine and costs, which had been stated to be $13.51. The magistrate testified that it had already been paid into the sheriff or clerk by Thompson, "and I got ahold of him and he wouldn't accept it and I tried to pay Mack back and he wouldn't accept it." That he had delivered capias exhibited to him, along with two more to Mack Thompson, to be turned over to the Sheriff of Alamance County; that the capias had never been returned.

The capias to Alamance County was introduced by the plaintiff, on the back of which was written, "Paid in full. Mack."

Bayliff testified that he had never issued a citation against the bondsman Mack Thompson. He further stated, "The amount of the bond was $25.00. If I had collected the bond it would have been $25.00 and no costs."

The plaintiff introduced witnesses who testified that they saw Hightower pay to the defendant Thompson $7.50 for going on his bond on the Sunday morning of his discharge.

This is substantially the evidence in the case. At the conclusion of the plaintiff's evidence, the defendant, offering none, demurred to plaintiff's evidence and moved for judgment of nonsuit, which was allowed. Plaintiff appealed.

E. F. Upchurch and D. E. Scarborough for plaintiff, appellant.

Long & Ross for defendant, appellee.

SEAWELL, J. The bail bond given by Thompson for the release of Hightower from custody pending the hearing appears from the evidence to have been an "appearance bond," presumably in the usual form, in the penal sum of $25.00. Upon its forfeiture by the nonappearance of the accused the bondsman thereby became obligated to the court in the sum of $25.00—the penal sum of the bond, no more, no less; and not for the fine or costs. 8 C.J. 5, "Bail," sec. 84; *Current v. Church,* 207 N.C. 658, 178 S.E. 72. The clear proceeds of this forfeiture are for the use of the public school fund; N. C. Constitution, Article IX, Sec. 5; and the "clear proceeds" have been judicially defined as the amount of the forfeit less the cost of collection, meaning thereby the citations and

process against the bondsman usual in the practice. *Board of Education v. High Point,* 213 N.C. 636, 197 S.E. 191; *S. v. Maultsby,* 139 N.C. 583, 51 S.E. 956.

In the case at bar there was no forfeiture declared by the court and no citation to the bondsman, Thompson, of any sort.

It is true that a bondsman may arrest the principal without process when necessary to have him in court in relief of his own liability while the appearance is still required; G.S. 1-435. That, however, is foreign to the case at bar. The procurement of a capias against the plaintiff when he had the personal right of arrest without process in exoneration of his liability on the bond, foreshadows the use to which the evidence tends to show the defendant put it. The evidence is not without its inferences that the defendant caused the plaintiff to pay him $52.00 under fear of arrest and imprisonment; an amount much in excess of the fine and costs, and seemingly representing the trouble and expense to which the bondsman was put in trying to find him,—a risk which he undertook when he went on the bond and not collectible in that way. It should have been submitted to the jury.

The judgment of nonsuit is

Reversed.

WILLIE D. MOORE v. WALTER BOONE ET AL.

(Filed 1 March, 1950.)

1. Automobiles § 18h (3)—

Plaintiff's testimony was to the effect that he was following a truck on the highway and was preparing to pass the truck when it suddenly turned to its left, so that plaintiff hit the rear of the truck. Plaintiff further testified that he was still in his right-hand lane when the impact occurred, and that he did not see any signal or lights on the truck showing that the driver intended to turn. *Held:* Plaintiff's evidence discloses contributory negligence barring his recovery as a matter of law.

2. Negligence § 11—

Plaintiff's negligence need not be the sole proximate cause of injury in order to bar recovery, it being sufficient for this purpose if it contributes to the injury as a proximate cause or one of them.

APPEAL by plaintiff from *Carr, J.,* November Term, 1949, of EDGECOMBE.

Civil action for personal injuries and damages to plaintiff's automobile, resulting from rear-end collision with defendant's truck, allegedly reduc-

ing its speed on highway in the nighttime without proper signals or lights.

On the night of 4 May, 1949, around 8:00 p.m., plaintiff was driving his 1947 Chevrolet sedan at a speed of about 50 miles an hour on Highway 258 between Rich Square and Scotland Neck, when he saw the defendant's truck in front of him traveling in the same direction at a speed of from 40 to 45 miles per hour.

Plaintiff says: "I had my lights on my car and I could see the truck in front of me and I saw the headlights in front of the truck. I gained on the truck before I overtook it and pulled up behind the truck to about 50 feet of it. I intended to pass it. I reduced my speed and dropped back to get my view to pass the truck. I did not see any signal or lights showing on the truck that the driver intended to do anything except go straight ahead. The weather was good. There was no traffic meeting me in front. The road is straight at this point for some distance both ways. When I dropped back to get my view, I blew my horn and the truck suddenly turned to its left and I hit the rear end.

"By the Court: 'You had pulled to your left to pass? A. No, sir. I was just picking up. Q. You were still on your right side of the center of the road at the time you collided with the truck? A. Yes, sir. I had not pulled over to the left to prepare to pass. It all happened in a moment as I applied my brakes. . . . I did not get out of the right-hand side of the highway before I hit the truck and I made no turn whatsoever to pass before I hit it and I hit it driving around 45 miles per hour and the truck was going about the same speed. . . .

"By Mr. Strickland: 'Q. Could you stop your car at 45 miles per hour within a space of 50 feet? A. Yes, sir.

"By the Court: 'Were you aware that the truck was turning to the left before the collision occurred? A. No, sir, I didn't know it. . . . Q. When you realized the truck had slowed down what did you do then? A. I put on my brakes but I was on it, I hit the back of it. Q. You say you don't remember seeing the truck at that time turning to the left? A. No. At the time I saw it it cut and I was on it then. I don't recall it making a turn, or no signal. Q. I mean before the impact, were you aware that the truck was turning? A. It slowed down suddenly and I was right on it."

The defendant testified that he had reduced his speed to about ten miles an hour for a distance of 75 yards, preparatory to making a left-hand turn and that his signal lights were on when the plaintiff ran into his truck from the rear.

For purposes of the appeal, it is admitted that plaintiff sustained serious and permanent injuries and his automobile was damaged to the extent of $700.

From judgment of nonsuit entered at the close of the evidence, the plaintiff appeals, assigning errors.

Cameron S. Weeks for plaintiff, appellant.
V. D. Strickland for defendants, appellees.

STACY, C. J. The question for decision is whether the evidence taken in its most favorable light for the plaintiff survives the demurrer. The trial court answered in the negative, and we approve.

It may be doubted whether sufficient evidence of negligence on the part of the defendant was offered on the hearing. However this may be, it clearly appears from the questions propounded by the court that plaintiff was inattentive to his own safety. He was either following defendant's truck more closely than was reasonable and prudent or he was driving at an excessive rate of speed under the conditions then existing. *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565. Such was the conclusion of the trial court, and his judgment is supported by the record. *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887; *Tarrant v. Bottling Co., supra.* Note, the plaintiff does not say the truck showed no signal lights indicating a left turn. His statement is, "I did not see any signal or lights showing on the truck that the driver intended to do anything except go straight ahead." *Hollingsworth v. Grier, ante,* 108.

The plaintiff's negligence, to defeat a recovery in an action like the present, need not be the sole proximate cause of the injury. It is enough if it contribute to the injury as a proximate cause, or one of them. *Fawley v. Bobo, ante,* 203; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623.

The case is controlled by the *Cox, Atkins, Austin,* and *Tarrant* cases above cited. There was no error in sustaining the demurrer to the evidence and dismissing the action as in case of nonsuit. Compare *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793.

Affirmed.

IN THE MATTER OF THE STATE OF NORTH CAROLINA ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA, v. W. H. WHITEHURST, TRADING AS COLONIAL CLEANERS.

(Filed 1 March, 1950.)

Master and Servant § 57—

Where, prior to the purchase of the business by defendant, there had been employed therein more than eight individuals for twelve weeks during the calendar year, and defendant, after purchasing the business, employs more than eight employees for sixteen weeks during the remainder of the year, defendant is an employer required to pay contributions upon the wages of his employees under the provisions of the Employment Security Act. G.S. 96-8 (f), subsection 1.

APPEAL by defendant from *Morris, J.*, at Chambers in Elizabeth City, N. C., 31 December, 1949. From PASQUOTANK.

This is a proceeding brought pursuant to the provisions of our Employment Security Law, to require the defendant to pay contributions as required by the Act, upon wages paid his employees during the year 1948.

The pertinent facts found by the Employment Security Commission of North Carolina, are as follows:

1. That during the year 1947, one M. E. Perry began the operation of a dry cleaning business in Elizabeth City, N. C., trading as Colonial Cleaners; that M. E. Perry did not employ as many as eight individuals in as many as twenty different weeks during the year 1947, but did employ as many as eight individuals during twelve weeks prior to 16 August, in the calendar year 1948.

2. That on 16 August, 1948, W. H. Whitehurst, a former employee of M. E. Perry, acquired by lease agreement, all the assets of M. E. Perry, trading as Colonial Cleaners, and continued to operate the business as W. H. Whitehurst, trading as Colonial Cleaners; and the said W. H. Whitehurst employed as many as eight individuals in as many as sixteen weeks during the remainder of the calendar year 1948.

Upon the foregoing facts the Commission held the defendant was an employer within the meaning of the Employment Security Law, during the year 1948, and required to report and pay contributions upon wages paid his employees during 1948 and continuing thereafter until coverage is terminated, as provided by law, and entered an order accordingly.

The defendant appealed from the order of the Commission to the Superior Court. The order of the Commission was affirmed by his Honor, and from which ruling the defendant appeals and assigns error.

W. D. Holoman, R. B. Overton, and R. B. Billings for appellee, the Employment Security Commission of North Carolina.

Harry B. Brown for defendant, appellant.

DENNY, J. The defendant contends that since he was not an employing unit at the time he bought the assets of M. E. Perry, trading as Colonial Cleaners, he could not be held an employing unit that acquired the assets of another so as to tack on his employment of more than eight individuals for sixteen weeks in 1948, to the employment of more than eight individuals for twelve weeks in 1948, by the previous owner of the business, and thereby make him liable for contributions upon wages paid his employees during 1948.

The answer to the defendant's contention is found in the pertinent provisions of the Employment Security Law.

G.S. 96-8 (e) defines an employing unit as follows:

" 'Employing unit' means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has, on or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this State . . ."

An employer who is required to pay contributions upon wages of his employees, is defined in G.S. 96-8 (f), subsection (1), as follows:

" 'Employer' means (1) any employing unit which in each of twenty different weeks within either the current or preceding calendar year has, or had in employment, eight or more individuals." And any two employing units may be treated as a single unit when they come within the provisions of G.S. 96-8 (f), subsection (3), which provides:

" 'Employer' means (3) any employing unit which acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection."

It will be noted that the right to treat two employing units as a single unit, is not referred to in the statute as an employing unit which *acquires* the organization, trade or business of another employing unit, but as an "employing unit which *acquired* the organization, trade, or business . . . of another employing unit and which, if treated as a single unit with such other unit, would be an employer" under the definition contained in subsection (1) of G.S. 96-8 (f).

Clearly, W. H. Whitehurst, trading as Colonial Cleaners, became an employing unit as defined by the statute, G.S. 96-8 (e), on 16 August, 1948, the date he began to operate the business. And the Employment Security Commission of North Carolina had the right to know whether or not the employing unit of W. H. Whitehurst, trading as Colonial Cleaners, acquired the business from another employing unit. There is but one answer to such inquiry. He acquired all the assets of another employing unit, and when these two employing units are treated as a single unit, as provided in the statute, then such unit employed as many as eight individuals for twenty-eight weeks in 1948, and "would be an employer" as defined in G.S. 96-8 (f), subsection (1).

We do not concur in the defendant's contention that in order for the employing unit of M. E. Perry, trading as Colonial Cleaners, and the employing unit of W. H. Whitehurst, trading as Colonial Cleaners, to be "treated as a single unit" it was necessary for W. H. Whitehurst to have been an "employing unit" prior to the time he acquired the assets of M. E. Perry. On the contrary, we think the defendant was an "employer" in 1948, within the meaning of the Employment Security Law. It follows, therefore, that the judgment entered below will be upheld.

Affirmed.

E. A. HILL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 March, 1950.)

1. Appeal and Error § 51a: Master and Servant § 25b—

Where, in an action under the Federal Employers' Liability Act, decision of the Supreme Court of North Carolina that there was insufficient evidence of negligence to be submitted to the jury is reversed on appeal to the Supreme Court of the United States, the decision of the Federal Supreme Court becomes the law of the case and precludes nonsuit in the second trial upon substantially the same evidence.

2. Appeal and Error § 39a—

Exceptions relating to an issue answered in appellant's favor will not be considered.

3. Master and Servant § 25b—

The Federal decisions relating to the duty of the employer to furnish a reasonably safe place to work are controlling in an action under the Federal Employers' Liability Act.

APPEAL by defendant from *Burgwyn, Special Judge,* September Term, 1949, of NASH. No error.

HILL *v.* R. R.

This was an action under the Federal Employers' Liability Act to recover damages for a personal injury alleged to have been caused by the negligence of the defendant. There was verdict for plaintiff, and from judgment thereon defendant appealed.

Cooley & May and Battle, Winslow & Merrell for plaintiff, appellee.
M. V. Barnhill, Jr., and F. S. Spruill for defendant, appellant.

DEVIN, J. This case was here at Fall Term, 1948, on the appeal of the plaintiff from a judgment of nonsuit and is reported in 229 N.C. 236, 49 S.E. 2d 481, where the material facts are stated. On the former appeal we affirmed, on the ground that the record was wanting in evidence of actionable negligence. The ratio *decidendi* was stated in the opinion of this Court as follows: "Upon the evidence presented, as it appears of record, the judgment of nonsuit was properly entered. The evidence fails to show, under the circumstances here, any duty incumbent upon the workmen on the cars, in unloading crossties in the usual way, to anticipate the movements and position of the plaintiff at the time of injury. Stated briefly, the evidence fails to make out a case of actionable negligence."

On plaintiff's petition to the Supreme Court of the United States for writ of *certiorari* that Court rendered the following judgment: *"Per Curiam:* The petition for writ of *certiorari* is granted, and the judgment of the Supreme Court of North Carolina is reversed. See *Tiller v. Atlantic Coast Line R. R. Co.,* 318 U.S. 54 (1943); *Bailey v. Central Vermont R. Co.,* 319 U.S. 350 (1943); and *Ellis v. Union Pacific R. Co.,* 329 U.S. 649 (1947)."

Thereafter in conformity with this decision the cause was remanded to the Superior Court of Nash County for trial. On the subsequent hearing issues of negligence and contributory negligence were submitted to the jury and answered in the affirmative, and damages awarded in sum of $22,000. From judgment on the verdict the defendant appealed to this Court assigning as error, *inter alia,* the denial by the trial court of its motion for judgment of nonsuit. The evidence adduced on the second trial was substantially the same as that which appears in the record of the previous trial.

While this Court was of opinion that the evidence offered on the first trial was insufficient to show negligence on the part of the defendant, and that the judgment of nonsuit was properly entered, on the plaintiff's petition for *certiorari* to the Supreme Court of the United States the decision of this Court was "reversed." The *per curiam* opinion did not amplify this brief judgment of reversal.

However, as the previous decision of this Court was that the evidence was insufficient to make out a case of negligence, and the ruling was only on the question of nonsuit, the judgment of reversal must be interpreted as a holding by our highest Court that there was evidence sufficient to carry the case to the jury on the issue of negligence. Hence, it follows that the judgment of the Supreme Court of the United States has become the law of the case, and must be held determinative of the question again presented as to the sufficiency of evidence substantially the same as that previously considered. There was no error in the denial of defendant's motion for judgment of nonsuit.

Defendant brings forward in his assignments of error exceptions noted to the ruling of the court below in the exclusion of certain proffered testimony, but as this relates to the issue of contributory negligence which was answered by the jury in defendant's favor, no serious question is presented. Nor can defendant's objections to the admission of testimony offered by plaintiff be sustained.

Defendant noted exception to the following portion of the trial court's charge to the jury: "I charge you that an employer is under the common law duty to use reasonable care in furnishing its employees with a safe place to work in, and this duty becomes more imperative as the risk increases, and it is a continuing one and is not relieved by the fact that the employee's work at the place is fleeting and infrequent." It is urged that this instruction placed a greater burden on the defendant than that imposed by the rule prevailing in this jurisdiction, and that the employer owes to his employee only the duty to exercise ordinary care to provide a reasonably safe place, as stated in *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326, and cases there cited. However, this action was instituted under the Federal Employers' Liability Act, and the excerpt from the charge to which exception was noted was quoted by the trial judge from the opinion in *Bailey v. Central Vermont R. Co.*, 319 U.S. 350. In that case it was said: "The rights which the act creates are Federal rights protected by Federal rather than local rules of law." For this reason we think the exception untenable.

Defendant also excepted to the charge on the ground that the trial judge failed to declare and explain the law arising on the evidence as required by G.S. 1-180, but from an examination of the charge in connection with this criticism we discover no substantial harm to the defendant.

In the trial we find

No error.

IN THE MATTER OF THE WILL OF AMANDA ETHERIDGE, DECEASED.

(Filed 1 March, 1950.)

Wills § 23a—

The probate of the will in common form is incompetent evidence in a caveat proceeding, even for the purpose of corroborating witnesses for propounder.

APPEAL by caveator, Fanny Etheridge Dough, from *Halstead, Special Judge,* at August Term, 1949, of DARE.

Civil action, an issue of *devisavit vel non,* raised by caveat filed to a paper purporting to be the written will of Amanda Etheridge, deceased, with witnesses, admitted to probate in common form upon the oath and examination of the two subscribing witnesses. G.S. 31-18.

On retrial in the Superior Court, pursuant to decision of this Court on former appeal, reported in 229 N.C. 280, 49 S.E. 2d 480, both the propounders and caveator offered evidence.

Propounders first offered the testimony of three witnesses tending to show the execution of the paper writing propounded as the last will and testament of Amanda Etheridge, Exhibit A. Two of the witnesses, A. C. Stratton and Nell H. Johnson, purport to be, and testified that they were witnesses to the execution of the said paper writing by Amanda Etheridge. The testimony of the third, Robert H. Atkinson, tended to identify the paper writing as the one signed by Amanda Etheridge.

Then "for purposes of corroboration propounders offered the probate of Exhibit A in common form identified as propounders' Exhibit B," and entitled "Probate of Will," consisting of the joint affidavit of the subscribing witnesses, Nell H. Johnson and A. C. Stratton, and the order of the Clerk of Superior Court adjudging that "the said paper writing and every part thereof is the last will and testament of Amanda Etheridge, deceased," and ordering it, together with the probate, to be recorded and filed. The caveator objected. Overruled. Exception 17. Other evidence was offered both by caveators and by propounders.

The case was submitted to the jury upon the same four issues which were submitted on the trial from which former appeal was taken. The jury answered all the issues favorably to propounders, and from judgment sustaining the will as propounded, the caveator Fanny Etheridge Dough appeals to Supreme Court and assigns error.

Worth & Horner for caveator, appellant.

Martin Kellogg, Jr., and John H. Hall for propounders, appellees.

WINBORNE, J. Of the numerous exceptions appearing in the record on this appeal, and purporting to have been taken by caveator, the ap-

pellant, during the progress of the trial in Superior Court, and assigned as error, the seventeenth exception is well taken. It has setting similar to an exception considered and passed upon in *Wells v. Odum,* 205 N.C. 110, 170 S.E. 145. What is said there applies here.

In the *Wells case,* as the record on appeal there shows, the propounders offered in evidence "proof of the witnesses of the will and the probate of the Clerk" to which caveators objected. The objection was overruled and caveators excepted, and, on appeal to this Court, based an assignment of error on the exception so taken. The record there also shows that "propounders offered this evidence for the purpose of corroborating" the two subscribing witnesses to the will, and the Clerk of Superior Court, all of whom were witnesses for the propounders. And this Court, treating the subject of this exception thus presented, in opinion by *Stacy, C. J.,* gave a negative answer to the question "Is the probate of a will in common form competent as evidence of its validity on an issue of *devisavit vel non* raised by a caveat filed to said will?"

In the *Wells case,* as here, the paper writing in question was offered for probate in common form without citation to those in interest "to see proceedings," *Benjamin v. Teel,* 33 N.C. 49,—a permissible practice under G.S. 31-12, formerly C.S. 4139, *et seq.,*—and when thus probated in common form, even though the proceeding be *ex parte,* such record and probate is, by statute G.S. 31-19, made "conclusive in evidence of the validity of the will until it is vacated on appeal or declared void by a competent tribunal," and, under decisions of this Court, is not thereafter subject to collateral attack. *In re Will of Rowland,* 202 N.C. 373, 162 S.E. 897.

Also in the *Wells case,* it is further declared that "a caveat is a direct attack upon the will" and that "the proceeding in common form before the Clerk is *ex parte,* and, therefore, not binding upon the caveators, as they were not parties," citing *In re Will of Chisman,* 175 N.C. 420, 95 S.E. 769, and *Mills v. Mills,* 195 N.C. 595, 143 S.E. 130. And the Court continued by saying: "If it should be held that the order of the Clerk adjudging the will to be fully proved in common form as 'conclusive in evidence of the validity of the will' (C.S. 4145, now G.S. 31-19) on the issue of *devisavit vel non,* raised by a caveat filed thereto, then the requirement that the propounders shall, upon such issue, prove the will *per testes* in solemn form (*In re Will of Chisman, supra*) would seem to be wholly unnecessary, and no caveat filed after probate in common form could ever be sustained," citing *In re Will of Rowland, supra.*

The contention of propounders, appellees, that it was incumbent on the caveator, in making the objection, to request that the exhibit be admitted only for the purpose for which it is competent, and having failed to do so, her general objection to its admission will not be sustained on appeal.

Under ordinary circumstances this rule would apply. But in case such as that under consideration, it was the duty of the trial judge, even *ex mero motu,* to exclude the order of probate, because of the effect given to it for certain purposes, but manifestly not for use in evidence on the issue of *devisavit vel non.*

Hence, as was said in the *Wells case, supra,* "for the error in admitting the probate in common form as competent evidence on the issue of *devisavit vel non,* raised by a caveat filed to the will in question, the caveator is entitled to a new trial."

Other matters to which exceptions are taken may not recur upon another trial, and need not now be considered.

New trial.

MARY ISABEL TOWE ET AL. v. OLIVER PENLAND ET AL.

(Filed 1 March, 1950.)

1. Evidence § 43b—

In this proceeding for partition, respondent claimed sole ownership upon his contention that he had conveyed petitioner his one-half interest in a lot inherited from his father under an agreement that he was to have the entire use of the *locus* owned by the parties as heirs at law of his mother. *Held:* Testimony of declarations by the mother prior to her death intestate tending to confirm the agreement as contended for by respondent is incompetent as hearsay.

2. Evidence § 41—

The fact that petitioners offer contradictory hearsay evidence does not render competent the hearsay evidence offered by respondents.

APPEAL by petitioners from *Crisp, Special Judge,* September "A" Term, 1949, of BUNCOMBE.

Petition for partition.

It is alleged that Sadie Bartlett Hall died intestate, 28 July, 1948, seized of Lot 13, Block "C" of the Perry Alexander lands, Buncombe County, leaving her surviving the petitioners, Mary Isabel Towe, a daughter, and the respondent, Oliver Penland, a son, as her only heirs at law, who are now seized as tenants in common of said lot of land.

The respondent pleads sole seizin by estoppel by reason of an agreement with his sister in 1944 whereby the respondent conveyed to her and her husband his one-half interest in Lot 12, which they inherited from their father, with the understanding that at their mother's death he would have the whole of Lot 13. No other consideration passed between them. On the strength of this understanding the respondent has placed valuable improvements on Lot 13.

Over objection of petitioners, several witnesses were allowed to state what the deceased, Sadie Bartlett Hall, had related to them as the understanding between her children in respect of the division of the property; that her daughter was to get Oliver's part of Lot 12 and her son was to get the whole of Lot 13 at her death. There was no will or writing to this effect.

For example, Mrs. Ina Bryson testified: "Mrs. Hall told me that she had it fixed so there would not be any fussing at her death; that she just had two children and just had two homes; that she wanted one to have one and the other to have the other home. . . . She said that her son Oliver had signed his part (in Lot 12) to his sister, so that at her death Oliver would get her house." Objection; overruled; exception. Other witnesses were allowed to quote the deceased in similar vein.

The jury returned the following verdict:

"1. Are the petitioners and the respondents owners in fee simple of the lands described in the complaint, as tenants in common? Answer: No.

"2. Was a contract entered into between the petitioners Mary Isabel Towe and her husband, H. E. Towe, and the respondents Oliver Penland and wife, Ruth Penland, and Sadie Bartlett Hall, providing for the disposition and ownership of the property described in the petition, as alleged in respondents' amended answer? Answer: Yes."

From judgment on the verdict, the petitioners appeal, assigning errors.

George M. Pritchard and George H. Ward for petitioners, appellants.

Paul J. Smith for respondents, appellees.

STACY, C. J. It may be doubted whether any sufficient evidence appeared on the hearing to show that Sadie Bartlett Hall was a party to the agreement between the petitioners and respondents, "providing for the disposition and ownership of the property described in the petition." But however this may be, a new trial seems necessary by reason of the admission of incompetent hearsay evidence from several witnesses who professed to state what the deceased, Mrs. Hall, had related to them as the understanding between her children. This was prejudicial to the cause of the petitioners. Moreover, the record evidence seems to leave no doubt as to the cotenancy.

The fact that petitioners offered contradictory hearsay evidence did not render competent the hearsay evidence offered by the respondents.

The cases of *Allen v. Allen,* 213 N.C. 264, 195 S.E. 801, and *Coward v. Coward,* 216 N.C. 506, 5 S.E. 2d 537, cited by respondents, are not in point as applied to the facts of the instant record. Note, the deceased held no deed to Lot No. 12.

Whether the respondents would be entitled to equitable relief in a different proceeding is not before us for decision.

There are other exceptions worthy of consideration appearing on the record, but as they are not likely to occur on the further hearing we omit any present rulings thereon.

For the errors as indicated, a new trial is ordered.

New trial.

STATE v. FRED SWINNEY AND FRANK SWINNEY.

(Filed 1 March, 1950.)

1. Automobiles § 28a—

When an act is in violation of a statute intended and designed to prevent injuries to persons, and is in itself dangerous, and death ensues, the person violating the statute may be held guilty of manslaughter, and in some circumstances of murder.

2. Automobiles § 28c—

Evidence that defendant was driving 55 to 70 miles per hour in a congested area where the statutory speed limit was 35 miles per hour, and struck an automobile traveling in the opposite direction, while defendant was on his left-hand side of the highway, resulting in the death of an occupant of the other vehicle, together with the physical surroundings and attendant circumstances of the occurrence, *is held* sufficient to be submitted to the jury on the charge of manslaughter.

APPEAL by defendant, Frank C. Swinney, from *Clement, J.,* October Term, 1949, of ROCKINGHAM.

Criminal prosecution on indictment charging Frank C. Swinney and his brother Fred with (1) "hit and run" driving and (2) with manslaughter.

On the afternoon of 4 December, 1948, Frank Swinney was driving his Ford automobile on Highway No. 87 in Rockingham County, going in the direction of Leaksville, when he ran into a Plymouth automobile, traveling in the opposite direction, and in which Edwin Fuller, his wife and two children were riding. The speed of the Plymouth was about 20 miles an hour. The occupants of both cars were severely injured and Mrs. Fuller was killed instantly.

Fred Swinney, in a Chevrolet pick-up truck, was either following closely or driving side by side with his brother at the time of the collision. The wreck occurred in a congested area where the speed limit was 35 miles an hour.

The evidence is in conflict as to the speed of the cars, but the State's evidence shows that Frank Swinney was driving on his left-hand side

of the road and at a dangerous and much higher rate of speed than that allowed by the traffic laws when the collision occurred—55 to 70 miles an hour.

Fred Swinney was cleared of all charges, while Frank C. Swinney was convicted of manslaughter.

From judgment on the verdict Frank C. Swinney appeals, assigning as error the refusal of the court to sustain his demurrer to the evidence or to dismiss the action as in case of nonsuit.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

P. W. Glidewell, Sr., for defendant.

STACY, C. J. The question for decision is whether the evidence taken in its most favorable light for the prosecution suffices to overcome the demurrer and to carry the case to the jury. The trial court answered in the affirmative, and we approve.

It is conceded that the defendant was violating the traffic laws of the State at the time of the collision. These were designed to prevent injury to persons and property and to guard against accidents and injuries such as occurred here. *S. v. McIver,* 175 N.C. 761, 94 S.E. 682. Moreover, the State's evidence tends to show that the defendant was driving recklessly and at a dangerous rate of speed. The physical surroundings and attendant consequences of the occurrence, which speak their own language, were also brought to bear on the side of the prosecution. *S. v. Hough,* 227 N.C. 596, 42 S.E. 2d 659. The case was properly submitted to the jury. *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; *S. v. Miller,* 220 N.C. 660, 18 S.E. 2d 143; *S. v. McMahan,* 228 N.C. 293, 45 S.E. 2d 340; *S. v. Reid,* 230 N.C. 561, 53 S.E. 2d 849.

It is generally held that when an act is in violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, the person violating the statute may be held liable for manslaughter, and under some circumstances of murder. *S. v. Rountree,* 181 N.C. 535, 106 S.E. 669; *S. v. Trott,* 190 N.C. 674, 130 S.E. 627; *S. v. McIver, supra.*

The difference between civil liability and criminal responsibility for ordinary and culpable negligence was fully explained in the court's charge. *S. v. Cope,* 204 N.C. 28, 167 S.E. 456. Indeed the case seems to have been tried in strict conformity to decisions on the subject.

No valid exceptive assignment of error appears on the record, hence the verdict and judgment will be upheld.

No error.

STATE v. JOE ASHLEY.

(Filed 1 March, 1950.)

1. Automobiles § 28c—

Evidence tending to show that defendant, after he had been followed to a house by officers and while the officers were assembled in front of the house in the driveway leading to the road, drove a car from behind the house into the driveway from one side of the driveway to the other and out into the road, *is held* insufficient to be submitted to the jury on a charge of assault with a deadly weapon, since the evidence affords a basis for the reasonable inference that defendant was seeking to avoid the officers and to escape rather than intentionally to injure them.

2. Automobiles § 28d—

Testimony of officers that defendant, in driving his car from a house along a driveway to the highway, attempted to strike the officers assembled in front of the driveway, *is held* a statement of conclusion rather than an evidential fact.

APPEAL by defendant from *Clement, J.*, November Term, 1949, of CASWELL. Reversed.

The defendant was indicted in three cases for assault with deadly weapon, to wit, an automobile, upon three several persons, on the same occasion. There was verdict of guilty in each case, and from judgment imposing sentence, the defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

P. W. Glidewell, Sr., for defendant.

DEVIN, J. The only error assigned by defendant in his appeal to this Court is the denial of his motion for judgment of nonsuit.

It appears from the record that at the trial the State offered evidence tending to show that on the night of 14 December, 1948, the sheriff accompanied by two deputies and a highway patrolman went to a tobacco barn near where a still had been seized and found seventy gallons of nontax-paid whiskey. A man named Fuller was arrested there. After the officers had waited at the barn an hour two men approached, and, hearing no response to their inquiry, ran. The officers pursued them some distance through the woods and finally saw them disappear behind a house. The officers then assembled in front of the house in the driveway leading to the road, with their flashlights burning, and shortly thereafter heard a car start. The car came out from behind the house into the driveway "going from one side to the other of the driveway," and on out to the road. The car was "weaving from side to side" as one witness

expressed it. No word was spoken by the officers or the driver, but the officers shot down a tire of the car, and then tracked it down the road and found it in another yard. Next day the defendant claimed the car, admitting he was driving it at the time but stating he had nothing to do with the still or liquor, that he had heard he could buy liquor at the barn and had gone there for that purpose. There was no evidence that the defendant had anything to do with the manufacture or possession of the whiskey found, and the case against him on that ground was properly dismissed by the trial judge.

From this resume of the pertinent testimony in the case, it is apparent that, though there was some ground for suspicion of guilty knowledge of illicit liquor operations on the part of the defendant, the evidence was not of that definite and substantial character required to convict him of an assault with a deadly weapon upon either of the officers. No one of them was touched by defendant's automobile, nor was there evidence of a purposeful menace of violence by that means. The presence in the darkness of four men, identity undisclosed to the defendant, in the narrow driveway leading from the house to the road along which defendant was attempting to travel, affords basis for the reasonable inference that the manner in which he drove was due to his seeking to avoid them and to escape, rather than intentionally to injure them. *S. v. Daniel,* 136 N.C. 571, 48 S.E. 544. True, several of the officers testified "the car tried to strike us," but we think that the statement of a conclusion rather than an evidential fact.

From an examination of the evidence offered at the trial as set out in the record, we conclude that the defendant's motion for judgment as of nonsuit should have been allowed, and that the judgment must be

Reversed.

STATE v. BENNIE DANIELS AND LLOYD RAY DANIELS.

(Filed 1 March, 1950.)

Criminal Law § 80b (4)—

Where defendants, convicted of a capital offense, fail to file case on appeal, the appeal will be dismissed after a careful examination of the record fails to disclose error.

DEFENDANTS' appeal from *Williams, J.,* May Term, 1949, Superior Court of PITT County.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Herman L. Taylor for defendants, appellants.

PER CURIAM. The defendants were tried and convicted at the May Term, 1949, of Pitt County Superior Court, on an indictment charging murder in the first degree, and were sentenced to death, from which judgment they gave notice of appeal. Not having served Case on Appeal in apt time they applied to this Court for a writ of *certiorari* for bringing up the Case on Appeal, which was denied for want of merit. *S. v. Daniels, ante,* 17. Subsequently they petitioned the Court for leave to file a writ of error *coram nobis;* and not having brought themselves within the purview of such a writ, petition was denied. *S. v. Daniels, ante,* 341. The above cited reports are referred to for a history of the case.

No case on appeal having been filed in the office of the Clerk, the Attorney-General has caused the record proper to be filed in this Court and moves that the case and record be docketed and the appeal dismissed under Rule 17 of the Rules of Practice of the Court.

We have carefully examined the record filed in this case and find no error therein. For the causes stated the motion of the Attorney-General is allowed; the judgment of the lower court is affirmed and the appeal is dismissed. *S. v. Watson,* 208 N.C. 70, 179 S.E. 455; *S. v. Johnson,* 205 N.C. 610, 172 S.E. 219; *S. v. Goldston,* 201 N.C. 89, 158 S.E. 926; *S. v. Hamlet,* 206 N.C. 568, 174 S.E. 451.

As to each defendant: Judgment affirmed; appeal dismissed.

PEOPLES BANK & TRUST CO. v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

(Filed 8 March, 1950.)

1. Forgery § 1—

A person without a bank account who signs his name to checks and presents them to the bank with intent that the signature should be taken as that of another of the same or similar name who has funds on deposit, and cashes the checks fraudulently and with knowledge that he was withdrawing from the bank the funds of such other person, is guilty of forgery.

2. Same—

The common law definition of forgery obtains in this State, the statute, G.S. 14-119, not attempting to define it.

3. Same—

Forgery is the falsification of a paper, or the making of a false paper, of legal efficacy, with fraudulent intent.

4. Same—

An instrument may be a forgery even though in itself it is not false in any particular, if there is a fraudulent intent that the signature should pass or be received as the genuine act of another person whose signing, only, could make the paper valid and effectual.

5. Same—

An instrument is nonetheless a forgery because the signature is not identical with that of the person whose signature it is intended to simulate if they are sufficiently similar for the doctrine of *idem sonans* to apply, and the insertion of a middle initial not in the signature simulated is not a fatal variance.

6. Indemnity § 2c—

The indemnity bond in suit did not cover loss caused directly or indirectly by forgery. The evidence disclosed that the loss in suit resulted from the cashing of checks by a person without a bank account, who signed his name and presented the checks with intent that the signature should be taken as that of another person of the same name who had funds on deposit. *Held:* a peremptory instruction that the loss was due directly or indirectly to forgery, and the entering of judgment for insurer upon the jury's affirmative finding, is without error.

7. Same—

Where an indemnity bond covers listed losses and not loss in general, a loss not listed is not an exception from general coverage, and insurer does not have the burden of showing that the loss sued on was due to a non-insured cause.

8. Trial § 28—

An instruction that if the jury should find the facts to be as all the witnesses had testified and as the record evidence discloses, to answer the issue as directed, is the correct form of a peremptory instruction.

BARNHILL, J., took no part in the consideration or decision of this case.

PLAINTIFF'S appeal from *Carr, J.,* November Term, 1949, EDGECOMBE Superior Court.

The plaintiff, appellant, sometimes herein referred to as the Bank, sued the defendant, sometimes referred to as the Insurance Company, on a policy issued by the latter, to recover for losses sustained by the bank through the transactions below described, in narrative form and in summary, from the evidence adduced by the plaintiff. The defendant contends that the losses are not covered by the terms of the policy.

The portion of the policy deemed pertinent to decision provides in section (a), *inter alia,* insurance against loss through various named

causes, including . . . "false pretense . . ." and in subsection (d) "against any loss (1) through accepting, cashing or paying forged or altered checks . . ." However a rider on the policy in the nature of an amendment provides: "In consideration of the premium charged for the attached bond it is understood and agreed as follows: 1. The attached bond is hereby amended: (a) By deleting insurance clause (D) . . .(c) By deleting from section 1 the following: Under subsection (a): 'D and E.'" It is not disputed that the effect of the amended rider is to withdraw from the coverage "any loss effected directly or indirectly by means of forgery." Portions of the complaint and answer were introduced by the plaintiff eliminating matters not in dispute; and these admissions, together with the evidence, oral and documentary, present the following history:

At the time of the transactions noted there were living in the Town of Rocky Mount and in the country nearby two persons of the same or similar names: Otha G. Langley, referred to in the record as Nash Street Langley, and Otha Langley, referred to in the record as R. F. D. Langley. The latter had a sizable deposit and account with the plaintiff bank. The former had none, and had never had any. The Nash Street Langley, however, had a few times visited the bank and had small government checks cashed, but had never made any deposit.

About August 13, 1946, Claude Harris, Jr., came into the bank accompanied by a man unknown to the teller and said he knew the man was Otha Langley, with the statement: "He says he has an account here and this check is good." He handed the check to the teller who sent it up by a conveyor to the bookkeeping department and it was sent back "o.k." and was cashed. Harris and Langley then walked to the window facing the street and talked awhile. Then Langley came back to the teller's window and said, "See what my balance is." The teller wrote a slip, "Balance..... Otha G. Langley?", and sent it upstairs to the accounting department through a conveyor tube, and it was returned $2272.69." The teller was acquainted with Harris and at the time the check was presented Langley was standing right by him, close enough to hear the conversation. When Harris said, "This is Otha Langley, he says he has an account here," Langley made no statement but was silent.

Thereafter several paid checks were identified as having been presented and cashed by Otha G. Langley of Nash Street, withdrawing the funds from the balance above stated, to wit: A check for $600 on August 19, 1946; a check dated August 20, 1946, for $100; a check dated August 23, 1946, in the amount of $300; a check dated August 31, 1946, in the amount of $100; a check for $100 dated August 31, 1946; a check for $100 dated September 17, 1946; a check for $100 dated September 23,

1946; a check for $200 dated October 1, 1946; a check dated September 2, 1946, in the amount of $1,887.77, which was paid on October 3, 1946; a check dated November 12, 1946, for $644.95.

Several paid checks of Otha Langley of R. F. D. in amounts running from $30 to $189.25 were introduced in evidence.

Some of the checks cashed for Otha Langley of Nash Street were signed "Otha Langley" and some "Otha G. Langley." The bank account was in the name of "Otha Langley."

These checks were signed by Otha Langley of Nash Street in the presence of the teller to whom presented and all of them presented in person, and cashed. One teller testified that "almost every time there was a woman that came with him and she would write out the check and I would see him sign it and he would present it to me." As to the check for $1887.77, Langley, that is Langley of Nash Street, asked for his balance and it was given him as $1881.77. He went over and this woman made out the check and the witness saw Mr. Langley sign it. It was for $6.00 more than the amount shown on the ticket but the teller gave him the $1887.77.

The teller who paid the $600 check on August 19 testified the check was sent upstairs for verification to find out if Langley had enough money to cover the check and whether the signature was authorized. The check came back "o.k.," on both points. Witness stated that "I thought it was the Langley that had an account in the bank and cashed the check in the belief that he was the man who had the deposit." Langley then asked that "my" bank statement be sent to Nash Street. The question of his not having gotten the statements was raised but it does not appear that Langley answered that. He did want the address changed. As a result of his request the address was changed and the statements for August, September, October and November went to the new address at 822 Nash Street.

The account carried in the bank had no "G" in the name of the depositor.

The teller stated: "I would not have paid the money except for my belief that I was dealing with the man who had the deposit in the bank. I thought it was Otha G. Langley. I thought this man was the man who had the deposit and the same thing goes for all the checks I cashed. I do not recall that he gave me any reason for wanting the address changed. I would not have paid any money to this man without a check, a piece of paper representing the authority of the bank to pay it out. I paid this money on the faith of the check that I received from this man being a check drawn on our bank by a man who had money in the bank, to wit, Otha Langley. I was relying upon the statement made to me by the man

I was facing that he had funds on deposit and because of that statement and the fact that the bookkeeping department o.k.'d the check (when) I cashed the check. I did not even know Mr. Langley of R. F. D."

Another teller testified that she cashed the check now exhibited as dated November 12, 1946, in the amount of $644.95, "This man walked up to my window and asked me to find out his balance. I knew what his name was as I had cashed government checks for him before, so I inquired of the bookkeeping department and they sent his balance back, '$744.95.' He said, 'Make me a check out for that amount, except leave $100 in the bank.'" He was accompanied by a woman who made out the check and he signed it in her presence. "I think the 'G' in there was added after the check was cashed as it was not in there at the time I cashed it. Our checks are run through a photostat on the day they are cashed, or the next day, and the photostatic copy of the check now exhibited to me made from the photostat does not show the 'G' on it, and since the check just exhibited to me has a 'G' in it, it must have been added after it was cashed." This witness stated that she had cashed some government checks for the man as he was getting $20 a week government checks. These checks came to Otha G. Langley as a member of the "52-20 club," meaning a veteran, entitled to receive $20 a week for unemployment not in excess of 52 weeks. She stated that the check when cashed did not have any "G" in the signature but that this "G" was inserted by someone after the check had been returned to Langley. The ledger sheet now shows the account in the name of Otha Langley, 822 Nash Street, Rocky Mount, N. C. The witness stated that she would not have paid out the money "if he had not signed a piece of paper in the form of a check as my authority to pay out the bank's money. I paid it believing that he was the Otha Langley who had the deposit in our bank"; that she relied both upon the statement of Otha G. Langley and that of the bookkeeper. In every instance the check was signed in the presence of a teller and was personally presented at the window for payment.

Otha Langley of R. F. D., not having received his bank statements for the months of August, September, October and November, caused inquiry to be made at the bank and the fraudulent withdrawals from his account by Langley of Nash Street came to light. The sum of $1,797.58 was recovered from Otha Langley of Nash Street, reducing plaintiff's loss by that amount.

Otha Langley, R. F. D., testified that he made all the deposits credited to his account in the Peoples Bank; that he did not sign or authorize any of the checks aggregating $4,177.72 drawn by Otha G. Langley on his account; that the Peoples Bank had credited to the account of witness

(Otha Langley of R. F. D.) the amounts withdrawn on the fraudulent checks. He further testified:

"When I opened my account I gave the bank my mailing address. I received bank statements up to the first of August, 1946, at Rocky Mount, R. F. D. #4. Then I went about three months without getting a statement. I never changed my address given to the bank. In October or November I made inquiry through my wife about my statements, and they began coming again to my regular address in December.

"December 1, I got a statement that I didn't have any money in the bank."

Plaintiff rested, and at the conclusion of its evidence the defendant moved the court for judgment as of nonsuit, which was denied. The defendant offered no evidence. The plaintiff tendered the following issues:

"Q. Did Otha Langley unlawfully obtain funds from the plaintiff bank by false pretense, as alleged in the complaint?" A. .....

"Q. If so, what amount is plaintiff entitled to recover of the defendant? A. ....."

Plaintiff moved for peremptory instructions in its favor on the issues. The motion was denied and plaintiff excepted.

The court declined to submit the issues tendered by the plaintiff and plaintiff excepted. The defendant tendered the following issue:

"Q. Was the loss sustained by plaintiff bank set out in the complaint effected directly or indirectly by forgery as alleged in the answer?"

The court announced its intention to submit the issue tendered, and plaintiff excepted thereto.

The defendant then moved for peremptory instructions in its favor on the issue tendered by it. The motion was allowed and plaintiff excepted.

The court charged the jury as follows:

"This case you have been hearing evidence in, Peoples Bank & Trust Company *v.* The Fidelity and Casualty Company of New York, involves a case in which a very interesting principle of law has been argued to the Court in your absence. The plaintiff bank sues the Fidelity and Casualty Company on a bond indemnifying it against certain losses and it all boils down to this question, under the language of the bond sued on, as to whether or not under all the

evidence that you have heard in this case the bank has as a matter of law sustained its loss by reason of a false pretense or by reason of a forgery, and that is a question of law, and after hearing the arguments on both sides (the Court is of the opinion that under the evidence of this case, the undisputed evidence, the plaintiff sustained a loss by reason of a forgery as a matter of law,) and under the bond the plaintiff would not be entitled to recover if the loss complained of was sustained either directly or indirectly by a forgery, and (the court being of that opinion the court instructs you as to the one and only issue submitted, 'Was the loss sustained by plaintiff bank set out in the complaint effected directly or indirectly by forgery as alleged in the Answer?' that if you find the facts to be as the witnesses have testified and as the record evidence discloses and as all the evidence tends to show, it would be your duty to answer that issue YES.)"

To the portions of the foregoing marked in parentheses the plaintiff excepted.

The plaintiff also excepted to the charge of the court as failing to state the evidence in the case and to declare and explain the law arising thereon.

The jury returned and asked an explanation as to what was meant by "direct" and "indirect" in the instruction given them. When the judge charged "If it was the direct or indirect use of a forged instrument, then the plaintiff would not be entitled to recover as under the bond it is specifically stated that if a loss of that type indirectly or directly is by forgery, then the bank is not covered under that bond. It covers losses by false pretense but not forgery." And upon an inquiry by the jury, "Impersonation is not related to forgery in any manner?", the court replied, "Yes, it might be. Forgery is the using of an instrument that is intended to be the instrument of another person. One who falsely uses a check or a note or a paper writing, even though it may contain his own name on it, if it is intended and designed to be received as the instrument of another person, then that is forgery." The plaintiff entered a general exception to the statements made by the court to the jury in response to its inquiry and to the failure of the court to adequately answer the jury's inquiry. The jury returned a verdict favorable to the defendant, answering the issue, Yes. And to the ensuing judgment in defendant's favor, plaintiff objected, excepted and appealed.

Thorp & Thorp for plaintiff, appellant.

Battle, Winslow & Merrell for defendant, appellee.

SEAWELL, J. We are advised by counsel that the instant case is one of first impression in this State. Our own examination of the Reports reveals no decision of this Court dealing directly with a similar factual situation.

Two persons bearing the same name, Otha Langley, are concerned in the transactions out of which the litigation grew. Otha Langley of R. F. D. had a fund on deposit and a checking account with the plaintiff bank; Otha Langley of Nash Street had none. The latter, signing his own name, drew checks on the bank from time to time which were paid to him by the bank out of the deposit of the other Otha Langley, thereby drawing the funds of the latter from the bank during a period of over four months and in a total amount of over $4,000.00. The other Langley, the owner, was moderately checking on the deposit meantime.

We need not toy with the abstract question whether a person may commit forgery by signing his own name, since the attendant conditioning circumstances must be given to evoke an intelligent answer.

The determinative question on the evidence presented is whether Otha Langley of Nash Street, signing checks in his own name and fraudulently and knowingly withdrawing from the bank the funds of another of like or similar name, is guilty of forgery. The appellee says, Yes; the appellant says, No. We are inclined to agree with the appellee when it appears that the signature of the withdrawer, although in his own name, was intended to be taken as the act, or the genuine signature of the owner of the fund without whose authority it could not be lawfully withdrawn. See citations, *infra.*

It is not disputed that the policy does not cover losses which forgery is directly or indirectly effective in producing. Our task is, therefore, to analyze the transactions found in the evidence to see if they may be rectified so as to eliminate altogether the element of forgery as an influence, near or remote, in producing the loss. The appellant contends that this is easily done, since forgery was never at any time present. It sees as the only effective isolate of such refining process the crime of *false pretense.*

The crime of forgery has been made the subject of statutes in practically all the states in the Union, including our own. This makes it necessary to examine with care decisions cited as authority, many of which observe variations in the common law effected by the local statutes. The North Carolina statute pertinent to the class of forgery here charged, G.S. 14-119, (see also 14-120), has been held not to exclude common law forgery. *S. v. Hall,* 108 N.C. 776, 13 S.E. 189; *S. v. Lamb,* 198 N.C. 423, 152 S.E. 154; *Parrish v. Hewitt,* 220 N.C. 708, 18 S.E. 2d 141. At any rate it does not attempt to define forgery, but merely includes the acts

described as within that category. For a definition of forgery as within the statute we must resort to the common law.

Some pertinent definitions of forgery most frequently used by the courts are quoted here for the purpose of analyzing the crime into its essential constitutive parts, upon which emphasis must be placed, rather than upon the incidental or accidental features of its accomplishment,—one of which, in the instant case, is the identity or similarity of names between the alleged forger and the man whose rights are affected.

From the two leading law encyclopedias in common use we take the following:

> "Subject to statutory variations, forgery may generally be defined as the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." . . . "The verb 'forge' in law means to make a false instrument in similitude of an instrument by which one person could be obligated to another for the purpose of fraud and deceit; to make or alter with intent to defraud." 37 C.J.S., "Forgery," Sec. 1.
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> "Blackstone's definition of forgery (3 Com. 247) as 'the fraudulent making or alteration of a writing to the prejudice of another man's rights' is frequently quoted by the courts, as is Coke's statement (3 Inst. 169) that 'to forge is metaphorically taken from the smith who beateth upon his anvil and forgeth what fashion or shape he will. The offense is called *crimen falsi,* and the offender *falsarius,* and the Latin word, to forge, as *falsari,* or *fabricari,* and is properly taken where the act is done in the name of another person.'" 23 Am. Jur., "Forgery," Sec. 2. See 23 Am. Jur., "Forgery," Sec. 2, and 37 C.J.S., Forgery, Sec. 1; Words and Phrases, Perm. Ed., title, "Forgery."
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> "Forgery, at common law, denotes a false making . . . a making, *malo animo,* of any written instrument for the purpose of fraud and deceit." 2 East P. C. 852.
>
> "It is the making or altering of a document with intent to defraud or prejudice another so as to make it appear to be a document made by another." *In re Windsor,* 10 Cox C. C. 118, 124.

From these definitions we find that the essentials to the completion of the offense are: (a) The falsification of a paper, or the making of a false paper, of legal efficacy "apparently capable of effecting a fraud;" (b) the fraudulent intent. 37 C.J.S., "Forgery," Sec. 3. It is to be noted that the falsity of the writing does not necessarily or usually refer to the tenor of the writing or of facts stated in it, but to the want of

genuineness in its making,—"without regard to the truth or falsehood of the statement it contains;" *Id.,* Sec. 5.

In forgeries of the character under consideration the falsity of the paper consists in the falseness of its purported authority, the fraudulent intent that the signature shall pass or be received as the genuine *act* of the person whose signing, only, could make the paper valid and effectual. The question of intent is dominantly important.

False pretense and forgery are closely akin, both belonging historically to the family of offenses known to the common law as "cheats," and now so classed. False pretense is the heart of forgery,—the essence of its being. The principal difference between the two, historically developed in the common law, is that forgery exclusively pertains to a writing, while false pretense covers fraudulent deceits by parol. Treatment of forgery as a separate offense came from recognition that a fraud perpetrated in altering a writing or in making a false writing tends directly to destroy the security which permanent monuments in writing give to transactions affecting the more important rights of persons privy to them. It became a separate and graver offense; but the *gist* of forgery still is *fraud. Davenport v. Commonwealth,* 154 S.W. 2d 552, 287 Ky. 505; *Leslie v. Kennedy,* 225 N.W. 469, 249 Mich. 553; *S. v. Luff,* 198 N.C. 600, 152 S.E. 791; Burdick, Law of Crime, Vol. 2, p. 550, sec. 663.

There is then no logical reason whatever that we can see that would confer immunity from the charge of forgery upon a person who signs his own name to a check with the fraudulent intent that it should be taken as the act of another person of like name, thereby withdrawing to his own use the deposits made by another. While, as stated, that exact situation has not been presented to this Court on any appeal so far as we can find, there is such a consensus of authority on the subject in other states and among learned writers that we must consider the proposition definitely established by the weight of authority as well as logical and sound in principle. 37 C.J.S., "Forgery," Sec. 9; 23 Am. Jur., Sec. 9; *Thomas v. First National Bank,* (Miss.) 58 So. 478, 39 L.R.A., N.S. 355; *Commonwealth v. Foster,* 114 Mass. 311, 19 Am. Rep. 553; *Barfield v. State,* 29 Ga. 127, 74 Am. Dec. 49; *International Union Bank v. National Surety Co.,* 245 N.Y. 368, 52 A.L.R. 1375; *White v. Van Horn,* 159 U.S. 3, 40 L. Ed. 5; 2 Bishop's Criminal Law, Sec. 585; *Edwards v. State,* 53 Tex. Cr. 50, 108 S.W. 673; 126 Am. St. Rep. 767; *People v. Rushing,* 130 Cal. 449, 62 P. 742, 80 U.S.R. 141; *Beattie v. National Bank of Ill.,* 171 Ill. 581, 65 U.S.R. 318. Economy of space compels us to make the list selective rather than exhaustive. We think we should add to the foregoing authorities, however, *Bank v. Marshburn,* 229 N.C. 104, 47 S.E. 2d 793, which the appellee says, and we think with reason, commits the Court to this view.

It is suggested by the appellant that there is not sufficient similarity between the names of Otha Langley and Otha G. Langley to bring the case within the definitions of forgery, although it may have been false pretense. The authorities seem to be against that position. The evidence shows that the checks were drawn by Langley of Nash Street by signatures sometimes made Otha Langley, and sometimes written Otha G. Langley; but the similarity of the names, certainly when the fraud has been accomplished, has in similar cases been considered sufficient. 37 C.J.S., "Forgery," Sec. 13. A similar position with regard to handwriting was taken in the case of *S. v. Cross and White,* 101 N.C. 770, 7 S.E. 715, and rejected by the Court:

> "This proposition would excuse an act of forgery in every case even when the fraud had been consummated, when the person upon whom it was practiced was unacquainted with the handwriting of one whose signature it purported to be and who reposed confidence in the genuineness of the paper. The variation in the writing may be evidence of the absence of an intent to defraud, but not when the intent has been developed in the act of defrauding . . . Besides the variance was not so marked as to call for such a direction."

State v. Chance, 82 Kan. 388, 20 Ann. Cas. 164; *S. v. Lane,* 80 N.C. 407; *S. v. Collins,* 115 N.C. 716, 20 S.E. 452; *S. v Higgins,* 60 Minn. 1, 51 A.S.R. 490.

The general holding is that when designed and used as an instrument of fraud the act is forgery, although the names are not identical, but merely *idem sonans;* and the use of a recurrent middle letter not in the simulated signature is not a fatal variance. *White v. Van Horn, supra.* The contention must be rejected.

We have already referred to the fact that the combination of circumstances making this kind of forgery opportune must be rare. And we might add here as peculiarly applicable to the instant case, the observation in *Commonwealth v. Foster, supra,* as follows:

> "The question of forgery does not depend upon the presence upon the note itself of the *indicia* of falsity. If extrinsic circumstances are such as to facilitate the accomplishment of the cheat without the aid of any device in the note itself, the preparation of a note, with intent to take advantage of those circumstances, and use it falsely, is making a false instrument."

As we have stated, the question of intent is dominantly important; and we think the controversy narrows down to the evidence tying Langley with the forgery. Outstanding items of this evidence are as follows:

It may be inferred that he discovered the existence of the account in the name of the other Otha Langley at the time the first check drawn by him was cashed, under the circumstances accompanying it, and found that his signature would pass the test at the teller's window. He promptly took advantage of this circumstance, and inquiring what "my" balance was,—knowing he had none—expressed no surprise at the amount given. Although he deposited nothing he knew the deposits grew from time to time in the name of Otha Langley. He himself had never deposited a cent there, and could not assume that he was the beneficiary of some anonymous friend, nor was he depending on an unlawful overdraft or an extension of credit by the bank. The assault was made upon a specific account, which the evidence discloses he hawked from the beginning of the transactions, inquiring with every withdrawal what "my" balance was. He requested that his bank statements be sent to a new address—his residence on Nash Street,—inferribly to put off the day of discovery, which he succeeded in doing for over four months, or until the real owner of the deposits became anxious to know why he had not received his statements, and discovered that his account had been milked almost as fast as he had replenished it, and that he had nothing. It may be inferred that the paid checks in evidence representing the modest and thrifty withdrawals of the rural Otha Langley, along with the spurious checks drawn by himself, went to Otha Langley at 822 Nash Street, giving him specific information of the identity of his namesake as the depositor.

We are only summarizing a few of the facts which the evidence tends to show and the legitimate inferences they engender, as an appellate judicial duty, apart from any intimation as to their ultimate truth. They constitute evidence of forgery.

We are not concerned here with the niceties which might be observed by the solicitor in choosing the subject of prosecution,—whether false pretense or forgery. We are convinced that if the culpable Langley had been tried and convicted of either offense the State would be estopped under the principle of former jeopardy of trying him again upon the other, since either crime must be predicated upon the same transactions. *S. v. Bell,* 205 N.C. 225, 171 S.E. 50. And we may observe, too, in that connection, that in a long series of transactions occurring during the four months Langley of Nash Street dealt with the account of Langley of R. F. D., forgery may have been aided by parol false pretense. Under a policy which expressly rejects liability for any loss effected directly

or indirectly by forgery it makes no difference which was the crime and which the adulterant.

The policy only covers the listed losses, not loss in general, and a clause which in plain terms rejects, in what must be considered the body of the instrument, loss which is effected directly or indirectly by forgery, is not an exception from a general coverage, leaving the burden on the defendant to bring itself within it.

It appears from the evidence that loss by forgery was deleted from the instrument, because such a coverage would have to be paid for by a higher premium, in language which does not constitute a *prima facie* covering.

We observe that each litigant requested a peremptory instruction to the jury in its own favor. The request of the plaintiff was denied and that of the defendant granted. The instruction was given in the formula frequently approved by this Court, leaving to the jury the weight of the evidence, or, in other words, its truth, as related to the issue, and the law to the court; and plaintiff's objection to that phase of the case cannot be sustained.

Other objections and exceptions not specifically mentioned herein have been carefully examined and do not, in our opinion, justify interfering with the verdict or judgment.

We find

No error.

BARNHILL, J., took no part in the consideration or decision of this case.

VENUS LODGE NO. 62, F. & A. M., AND PRINCE HALL GRAND LODGE, F. & A. M., v. ACME BENEVOLENT ASSOCIATION, INC.

(Filed 8 March, 1950.)

1. Associations § 4—

Where the parent organization imposes no restraint on the alienation of property by the local association, but its sole interest in the property of the local association is that such property should vest in it in the event of the dissolution of the local association, such parent organization has no standing to question the validity of a conveyance of property by the local association, the local association never having been dissolved.

2. Associations § 1—

An unincorporated association is a body of individuals acting together for some common enterprise by methods and forms used by incorporated bodies, but without a corporate charter.

3. Same—

At common law an unincorporated association has no legal entity and cannot contract, or take, hold or transfer property, or sue and be sued.

4. Associations § 4—

A conveyance to an unincorporated association is not void at common law, but vests the title to the property conveyed in the members of the association as individuals.

5. Same—

At common law, a conveyance of property to trustees for the benefit of an unincorporated association vests the legal title in the trustees who hold the same in trust for the individuals composing the association.

6. Same—

Where property is conveyed to trustees for the benefit of an unincorporated association, the members of the association, acting unanimously, have the right to cause the trustees to convey the property to a person designated by them, even though the conveyance is not calculated to promote the objectives of the association.

7. Torts § 1—

The execution of a legal right cannot become illegal merely because its execution is prompted by a mischievous motive.

8. Associations § 4: Trusts § 20c—

Where property is conveyed to trustees for the benefit of an unincorporated association, the conveyance of the property by the trustees to a designated person by the unanimous direction of the members of the association, is effective and cannot subsequently be challenged by the association, even if it later acquires the capacity to sue in its own name, nor by persons joining the association thereafter, since such persons never acquired any rights in the property. The transactions constituting the basis of this action occurred prior to the effective date of G.S. 39, Art. 4, and G.S. 1-97 (6).

APPEAL by plaintiffs from *Nettles, J.*, at September Term, 1949, of BUNCOMBE.

The plaintiffs sued to establish and enforce a constructive trust in realty and for an accounting for rents of the same on the theory that they had been deprived of such realty or of some interest therein by fraud of the defendant. When the testimony offered by the plaintiffs on the trial in the court below is accepted as truth, it directly or inferentially establishes the facts set out in the next eight paragraphs.

The plaintiff, Prince Hall Grand Lodge, is a corporation hereinafter called the Grand Lodge. It constitutes the supreme governing body of Free and Accepted Masons, a fraternal society having various subordinate lodges into which members are received in accordance with prescribed ritualistic ceremonies. These subordinate lodges possess distinct

property rights of their own; but the code of the Grand Lodge provides that "in the case of suspension or demise of any lodge, the property and furniture reverts to the Grand Lodge." On 21 July, 1936, the plaintiff, Venus Lodge No. 62, which is an unincorporated association and a subordiate lodge of Free and Accepted Masons, bought the premises in suit, and took title to them in the name of five of its members as trustees for its benefit.

The premises in controversy are situated on Market Street in Asheville, North Carolina, and consist of lands containing a three-storied business building. From 21 July, 1936, until 16 September, 1937, Venus Lodge used the third floor rent-free as a lodge room, and leased the remainder of the building to others.

In 1937, the officers and members of Venus Lodge became fearful that Venus Lodge was about to become inoperative, and that the premises in suit would be forfeited to the Grand Lodge under its code.

To forestall this contingency, they convened Venus Lodge in regular meeting, and then and there directed that the defendant corporation be formed, and that the trustees of the lodge convey the premises in controversy to it in fee simple. On 8 September, 1937, six of the members of Venus Lodge, acting as incorporators, organized the defendant, Acme Benevolent Association, Inc., as a corporation under the laws of North Carolina, and on 16 September, 1937, the trustees of Venus Lodge signed, sealed, acknowledged, and delivered to the defendant a deed sufficient in form to vest the premises in controversy in the defendant in fee simple.

All of the then members of Venus Lodge were admitted to membership in the defendant, Acme Benevolent Association, Inc., which was formed "to assist and give aid and comfort to such people which in the opinion of the corporation shall be deemed worthy of the same." Although the deed recited that the grantors had received "ten dollars and other valuable considerations," the conveyance was without consideration, and was designed to prevent the Grand Lodge from taking the property, which was worth at least $10,000.00, in case Venus Lodge became inoperative.

All contemporary members of Venus Lodge authorized the transfer of the property to the defendant, and had notice of all the facts surrounding the transaction. Brief contemporaneous memoranda of the conveyance were noted in the minutes of the lodge, and soon thereafter, to wit, on 19 November, 1937, the deed of the trustees to the defendant was registered in the office of the Register of Deeds of Buncombe County.

Upon delivery of the deed, *i.e.*, on 16 September, 1937, the defendant assumed control of the premises. From that time down to 14 September, 1948, when this litigation was commenced, the defendant claimed title to the property in controversy under its deed, and manifested such claim by leasing the various portions of the building to sundry tenants and by

using the accruing rents for its own purposes. The property was not returned for taxation, however, because of the belief of the defendant that it was exempt from taxation as the property of a charitable association.

Despite the forebodings of 1937, Venus Lodge did not become inoperative. On the contrary, it has continued to function as a subordinate lodge of Free and Accepted Masons, and to occupy the third floor of the building in controversy as its lodge room. It paid the defendant a monthly rental, however, for the use of such lodge room from 16 September, 1937, until 1948. At the time last mentioned, persons initiated into Venus Lodge during 1943 and subsequent years took charge of the lodge, which thereupon ceased to pay further rent to the defendant and joined the Grand Lodge in this action for the avowed purpose of establishing and enforcing a constructive trust and securing an accounting for the rents received by the defendant. The Grand Lodge and the persons who were acting as officers of Venus Lodge during 1948 did not acquire actual knowledge of the conveyance of 16 September, 1937, and the circumstances surrounding it until shortly before 14 September, 1948, when this action was begun.

When the plaintiffs had introduced their evidence and rested their case, the defendant moved the court to dismiss the action upon a compulsory nonsuit under G.S. 1-183. The trial court allowed the motion and entered judgment accordingly, expressly asserting that it did so because the testimony of the plaintiffs had disclosed that the cause of action asserted by them was barred by the lapses of time prescribed by G.S. 1-38 and G.S. 1-52 (9), which were affirmatively pleaded by the defendant. The plaintiffs excepted to the judgment and appealed, assigning errors.

James S. Howell and Oscar Stanton for plaintiffs, appellants.

J. A. Patla, Burgin Pennell, and J. M. Horner for defendant, appellee.

ERVIN, J. The chief inquiry presented by the appeal is whether the evidence of the plaintiffs is legally sufficient to take the case to the jury and to support a verdict in their favor. *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316.

Since the code of the Grand Lodge did not undertake to impose any restraint upon the alienability of the property of Venus Lodge or its members so long as Venus Lodge was an active subordinate lodge, and since there has never been any "suspension or demise" of Venus Lodge, the Grand Lodge has never had any semblance of claim to the property in suit, and is without standing to question the validity of the conveyance to the defendant. It follows that its action was properly dismissed upon a

compulsory nonsuit. In consequence, there is no occasion for the expression of any opinion on our part as to the legality of the provision of the code specifying that the property of a subordinate lodge vests in the Grand Lodge "in the case of suspension or demise" of the subordinate lodge. Divergent authorities relating to this problem have been collected in these annotations: 94 A.L.R. 646; 15 L.R.A. (N.S.) 336; 2 L.R.A. 841; 12 Ann. Cas. 873.

This brings us to the question of the propriety of the compulsory nonsuit as to the plaintiff, Venus Lodge. This phase of the litigation becomes much simplified if the judicial gaze is focused on the all-important fact that Venus Lodge was an unincorporated association when the transactions under scrutiny were consummated. At that time the rules of the common law relating to such associations had not been modified in North Carolina except in respect to religious bodies and organizations issuing certificates or policies of insurance.

An unincorporated association is merely a body of individuals acting together, without a corporate charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise. *Hecht v. Malley,* 265 U.S. 144, 44 S. Ct. 462, 68 L. Ed. 949. At common law such an association is not an entity, and has no existence independent of its members. *Tucker v. Eatough,* 186 N.C. 505, 120 S.E. 57; *Nelson v. Relief Department,* 147 N.C. 103, 60 S.E. 724. This being true, an unincorporated association has no capacity at common law to contract, *Nelson v. Relief Department, supra;* or to take, hold, or transfer property, 7 C.J.S., Associations, section 14; or to sue or be sued. *Hallman v. Union,* 219 N.C. 798, 15 S.E. 2d 361; *Citizens Co. v. Typographical Union,* 187 N.C. 42, 121 S.E. 31; *Tucker v. Eatough, supra; Nelson v. Relief Department, supra.*

Notwithstanding these principles, a conveyance to an unincorporated association is not void at common law in this jurisdiction. Since it looks at substance rather than form the common law construes such a conveyance to be a grant to the members of the association, and adjudges that it vests the title to the property embraced by the conveyance in such members as individuals. *Robinson v. Daughtry,* 171 N.C. 200, 88 S.E. 252, Ann. Cas. 1918E, 1186; *Daniels v. R. R.,* 158 N.C. 418, 74 S.E. 331; *Walker v. Miller,* 139 N.C. 448, 52 S.E. 125, 1 L.R.A. (N.S.) 157, 111 Am. St. Rep. 805; *Simmons v. Allison,* 118 N.C. 763, 24 S.E. 716; *Murray v. Blackledge,* 71 N.C. 492. See, also, in this connection: *Byam v. Bickford,* 140 Mass. 31, 2 N.E. 687; *Beaman v. Whitney,* 20 Me. 413. Moreover, it is well settled that a conveyance may be made to trustees for the benefit of an unincorporated association, and that in such case the legal title vests in the trustees, who hold the same in trust for the persons composing the association. 7 C.J.S., Associations, section 14.

The task of applying these principles to the testimony must now be performed. When Venus Lodge purchased the premises in controversy, the trustees took legal title to the same; but they held that title in trust for the individuals having membership in the Lodge under the common law rule that property ostensibly acquired or held by an unincorporated association belongs jointly to its members, who have the right to manage, control, and dispose of such property at their joint pleasure. 4 Am. Jur., Associations, and Clubs, section 35; 7 C.J.S., Associations, section 27; *Idaho Apple Growers Ass'n v. Brown,* 50 Idaho 34, 293 P. 320; *Ahlendorf v. Barkons,* 20 Ind. App. 656, 50 N.E. 886; *Dake v. Fuller,* 9 N.H. 536, 32 Am. D. 392; *Branagan v. Buckman,* 122 N.Y.S. 610, 67 Misc. 242; *Parks v. Knickerbocker, Trust Co.,* 122 N.Y.S. 521, 137 App. Div. 719; *U. S. Royalty Ass'n v. Stiles* (Tex. Civ. App.), 131 S.W. 2d 1060.

Inasmuch as they acted unanimously, the members of Venus Lodge had a clear legal right to cause the trustees to convey the premises to the defendant, even though the conveyance was not calculated to promote the objects of the Lodge. 7 C.J.S., Associations, section 14. When all is said, they were merely doing as they pleased with their own. *Hope of Alabama Lodge of Odd Fellows v. Chambless,* 212 Ala. 444, 103 So. 54; *Brown v. Stoerkel,* 74 Mich. 269, 41 N.W. 921, 3 L.R.A. 430; *Pullis v. Robinson,* 73 Mo. 199. As the deed of the trustees to the defendant was made in the exercise of an undoubted legal right belonging to the contemporary members of Venus Lodge, it did not become illegal merely because its execution was prompted by a mischievous motive on their part. "While mischievous motives may make a bad case worse, they cannot make that wrong which in its own essence is lawful." *In re Sharpe's Land,* 230 N.C. 412, 53 S.E. 2d 302.

Certainly Venus Lodge has no cause of action against the defendant in its own right as an association even if it be taken for granted that it has acquired the capacity to sue in its own name under statutes enacted subsequent to the occurrences resulting in this litigation. When these events took place, Venus Lodge was, in the eye of the law, an "airy nothing." *Nelson v. Relief Department, supra.* A cause of action cannot arise to a nonexistent legal ghost having no capacity to enjoy legal rights or to suffer legal wrongs. The suggestion that Venus Lodge can maintain the action for the benefit of persons who were initiated into membership in it after the execution of the deed to the defendant is without merit. These persons have no legal or equitable rights of their own in the property. Moreover, they cannot claim any such rights as successors of Venus Lodge, or of the individuals who were members of it when the deed was made; for Venus Lodge, as an unincorporated association, never had any rights in the property, and all of its contemporary

members participated in the making of the conveyance. 65 C.J., Trusts, section 886.

What has been said compels the conclusion that the defendants acquired complete title to the premises in controversy under the deed of 16 September, 1937. For this reason, we refrain from any observations upon the several statutes of limitation invoked by the defendant.

Although no occasion arises on the present record for us to express any opinion as to how far they have altered the common law rules relating to unincorporated associations, we deem it proper to call the attention of the bench and bar to certain statutes enacted subsequent to the events giving rise to this action. Chapter 133 of the Public Laws of 1939, which is now codified as Article 4 of Chapter 39 of the General Statutes, provides that "voluntary organizations and associations of individuals organized for charitable, fraternal, religious, or patriotic purposes" may acquire, hold, and convey real estate "in their common or corporate names." Chapter 478 of the 1943 Session Laws, which is now embodied in G.S. 1-97 (6), prescribes a method for serving process upon "any unincorporated association or organization" and declares that "any judgment recovered in any action commenced by service of process, as provided in this subsection, shall be valid and may be collected out of any real or personal property belonging to the association or organization." A thoughtful note in the North Carolina Law Review suggests that the last cited statute must be interpreted to render all unincorporated associations capable of suing or being sued in their own names in North Carolina courts. 25 N.C.L.R. 319.

The judgment dismissing the action upon a compulsory nonsuit is

Affirmed.

WILLIAM A. H. HOWLAND v. AMBER JUSTIZ STITZER, AND FIRST NATIONAL BANK & TRUST COMPANY, IN ASHEVILLE, NORTH CAROLINA, A CORPORATION.

(Filed 8 March, 1950.)

1. Divorce § 16½—

Provision in a decree of divorce rendered by another state directing the payment of stipulated alimony to the wife for life is not subject to attack in this State on the ground that the remarriage of the wife entitled the husband to a modification of the decree under the laws of the state rendering the decree (Sec. 1172-c, Thompson's Laws of New York, 1942 Cumulative Supplement) since the right to modify the decree rests solely in the court which rendered it.

2. Constitutional Law § 28: Judgments § 28½—

The judgment of another state may be collaterally attacked here only on the grounds of (1) lack of jurisdiction, (2) fraud in procurement, (3) being against public policy. Constitution of the United States, Art. IV, Sec. 1.

3. Declaratory Judgment Act § 2a—

An action to modify or reform the provisions of a judgment may not be maintained under the Declaratory Judgment Act. G.S. 1-254.

APPEAL by defendant Amber Justiz Stitzer from *Nettles, J.*, at Chambers in Asheville, North Carolina, 31 December, 1949. From BUNCOMBE.

This is an action to restrain the defendant, First National Bank & Trust Company, in Asheville, North Carolina, a banking and trust corporation, from paying the "income from four shares of common stock of Providence Journal Company, a Rhode Island corporation," held in trust by it, to its codefendant, Amber Justiz Stitzer, the former wife of the plaintiff; and to declare null and void "all provisions for the support of the defendant, Amber Justiz Stitzer, . . . during her natural lifetime," as set forth in a judgment entered in a court of the State of New York, on 15 October, 1947, wherein she obtained an absolute divorce from the plaintiff.

The plaintiff further seeks a declaration of the rights of the respective parties.

A temporary restraining order was obtained by the plaintiff and upon order to show cause why it should not be continued to the hearing, upon the hearing it was so continued. In the meantime the defendant Amber Justiz Stitzer, the former wife of the plaintiff, now the wife of Charles Stitzer, Jr., demurred to the complaint on several grounds, among them as follows:

"That it appears from the face of the complaint that the Court has no jurisdiction of the subject of this action in that the plaintiff seeks to cancel a provision of, and enjoin the payment of monies ordered paid for life, under a final judgment of absolute divorce of a court of the State of New York of competent jurisdiction, dissolving the bonds of matrimony between the plaintiff and the defendant, by a collateral attack in the courts of North Carolina, and under Article 4, Section 1, of the Federal Constitution, and under the doctrine of comity, the courts of North Carolina would have no power to amend, change, cancel, or enjoin a subsisting and valid decree of sister state, namely New York, under the allegations of plaintiff's complaint, for to do so would not afford full faith and credit to the New York decree guaranteed by the Federal Constitution, and the relief sought by the plaintiff, if any he may have, can be obtained only by a direct proceedings in the courts of New York having original jurisdiction of the cause.

"That the plaintiff's complaint does not state facts sufficient to constitute a cause of action, in that it appears from the face of the complaint:

"(a) . . .

"(b) . . . That the payments sought to be cancelled and enjoined by the plaintiff were to continue 'during the entire period of her lifetime by payment to her (the defendant Amber Justiz Stitzer) of the income from four shares of common stock of the Providence Journal Company, a Rhode Island corporation,' and that under the laws of New York or North Carolina, neither this Court nor the court of competent jurisdiction of the State of New York could legally cancel or enjoin the payment of the income of this stock."

The hearing on the order to show cause and the hearing on the demurrer were heard at the same time by consent, and from a judgment overruling the demurrer and continuing the restraining order to the hearing, the defendant, Amber Justiz Stitzer, appeals and assigns error.

William J. Cocke and Denis Mulligan (of New York City) for plaintiff.

David H. Armstrong for defendant Stitzer.

DENNY, J. The plaintiff is seeking to have the Superior Court of Buncombe County, North Carolina, declare null and void certain provisions of a judgment entered in a court of a sister sovereign state, without alleging fraud in its procurement, or attacking its validity in any other respect. He simply alleges that under the laws of the State of New York, by reason of the re-marriage of Amber Justiz Stitzer, she is no longer entitled to the benefits awarded to her for her support during her lifetime, under the provisions of a judgment entered in a court of the State of New York, and prays that he be discharged of all obligations imposed by said judgment with respect to her support.

However, the statute upon which the plaintiff is relying for the relief he seeks, being Section 1172-c, Thompson's Laws of New York, 1942 Cumulative Supplement; L. 1940, c. 226, Section 10, provides for notice and hearing before a judgment can be modified with respect to an award for the payment of alimony. This statute, in our opinion, only gives the courts of the State of New York the right to modify a judgment entered in the courts of that State with respect to an award for the payment of alimony, and the judgment must be given full faith and credit until modified. *Lockman v. Lockman,* 323 U.S. 84, 89 Law Ed. 86, *S.c.,* 220 N.C. 95, 16 S.E. 2d 670; *Barber v. Barber,* 323 U.S. 77, 89 L. Ed. 82; *S.c.,* 180 Tenn. 353, 175 S.W. 2d 324; *Graham v. Hunter,* 42 N.Y.S. 2d 717; *Hoyt v. Hoyt,* 38 N.Y.S. 2d 312; *Fales v. Fales,* 160 Misc. 799, 290 N.Y.S. 655, 295 N.Y.S. 754; *Little v. Little,* 146 Misc. 231, 262

N.Y.S. 654, affirmed without opinion in 236 App. Div. 826, 259 N.Y.S. 973; *Glaser v. Glaser,* 276 N.Y. 296, 96 N.E. 726; *Hess v. Hess,* 276 N.Y. 486, 12 N.E. 2d 170; *Johnson v. Johnson,* 196 S.C. 474, 13 S.E. 2d 593, 134 A.L.R. 318; *Beiwend v. Beiwend,* 17 Cal. 2d 108, 109 P. 2d 701, 132 A.L.R. 1264; *Barns v. Barns,* 9 Cal. App. 427, 50 Pac. 2d 463; *Paulin v. Paulin,* 195 Ill. App. 352. And there is no allegation in the plaintiff's complaint to the effect that such modification has been made in the courts of the State of New York, neither has such modified judgment been duly authenticated and made a part of plaintiff's complaint. If these facts appeared affirmatively in plaintiff's complaint, we would have no difficulty in upholding the ruling of the court below, but we think the Superior Court of Buncombe County is without authority to modify the judgment of the New York Court.

Cases involving the custody of children, such as *New York v. Halvey,* 330 U.S. 610, 91 L. Ed. 1133, upon which the appellee is relying, are not controlling on the present record.

Ordinarily, the judgment of a sister state may be collaterally attacked upon the following grounds: (1) Lack of jurisdiction; (2) fraud in procurement; or (3) that it is against public policy. *S. v. Williams,* 224 N.C. 183, 29 S.E. 2d 744; *S.c.,* 325 U.S. 226, 98 L. Ed. 1577; *Crescent Hat Co. v. Chizik,* 223 N.C. 371, 26 S.E. 2d 871; *Cody v. Hovey,* 219 N.C. 369, 14 S.E. 2d 30. It clearly appears, however, from plaintiff's complaint that he is not attacking the validity of the New York decree on any of these grounds, but that he is relying upon the validity of the divorce granted by the decree and seeks only such modification thereof as will relieve him of certain obligations imposed therein.

It is said in 31 Am. Jur., Judgments, Section 535: "Under the full faith and credit clause of the Constitution of the United States, a judgment rendered by a court of one State is, in the courts of another state of the Union, binding and conclusive as to the merits adjudicated. It is improper to permit an alteration or re-examination of the judgment, or of the grounds on which it is based." See also 50 C.J.S., Judgments, Section 891.

In the case of *Hoyt v. Hoyt, supra,* the parties had theretofore obtained a divorce in the State of Nevada. The decree contained certain provisions with respect to the payment of alimony. The plaintiff instituted an action in the State of New York to collect sums of money due under a separation agreement which had been incorporated in the divorce decree. The husband undertook to assert as a defense the invalidity of the separation agreement. The New York Court said: "The parties having submitted themselves to the jurisdiction of the Nevada Court, which also had jurisdiction over the subject matter, the decree entered is conclusive there, and under the full faith and credit clause of the

Constitution of the United States, Art. IV, Sec. 1, is equally so in every other State. . . . The only forum which has jurisdiction to modify, alter or amend the decree is the Nevada Court."

Also, in *Little v. Little, supra,* the question was presented whether the courts of New York might modify a judgment entered in New York upon a decree of a court of another state, so as to require the payment of a smaller amount of alimony than that provided for in the foreign decree. In the opinion of the New York Court, it is stated: "The proper remedy of the defendant would seem to be to obtain a modification in the courts of the State in which the judgment of divorce was originally rendered. . . . The judgment entered in this action being based and predicated upon the Illinois judgment, it is my opinion that it can be modified only upon the basis of a modification of the Illinois judgment."

And in *Paulin v. Paulin, supra,* the parties had been divorced in the State of Ohio, and the action was instituted in Illinois to collect alimony due under the original judgment. The defendant sought to have the Ohio decree amended. The Illinois Court said: "True it is that every decree for alimony is subject to be varied at a subsequent time by the court entering the decree, yet no other court can disturb it, and until such court does so, it remains fast, firm and final."

Counsel for plaintiff (Mr. Cocke) states in his brief that he is seeking a declaration of the rights of the parties, and in his oral argument before this Court, he took the position that the plaintiff is entitled to the relief he seeks under the provisions of the Declaratory Judgment Act, G.S. 1-253-267. The allegations of the complaint, however, are insufficient to invoke the provisions of that Act, even if jurisdiction of this cause be conceded.

The plaintiff is not seeking an interpretation of the provisions of a "deed, will, written contract or other writings constituting a contract," etc., as provided in G.S. 1-254, but he is seeking the modification or reformation of the provisions of a judgment. Moreover, the judgment he seeks to amend is not set out in his pleadings or an authenticated copy thereof attached thereto. See *Wright v. McGee,* 206 N.C. 52, 173 S.E. 31; *Brandis v. Trustees of Davidson College,* 227 N.C. 329, 41 S.E. 2d 833; *Lide v. Mears, ante,* 111, 56 S.E. 2d 404.

For the reasons herein stated, and the cited authorities in support thereof, the order overruling the demurrer and continuing the restraining order to the hearing, is reversed.

Judgment vacated, proceedings dismissed.

ROGER DOUGLAS COOLEY v. WILLIAM THOMAS BAKER AND CAREY K. BIZZELL.

(Filed 8 March, 1950.)

1. Automobiles § 8c—

The violation of G.S. 20-154, requiring that a driver turning from a direct line shall first see that such movement can be made in safety and, whenever such movement may affect the operation of another vehicle, to give proper signal, is negligence, and is actionable if such violation proximately causes injury to another.

2. Automobiles § 7—

Statutes regulating the operation of motor vehicles must be given a reasonable and realistic interpretation with regard to physical conditions to effect the legislative purpose to promote and not obstruct vehicular travel.

3. Automobiles § 8c—

The requirement of G.S. 20-154 that a motorist shall not turn from a straight line until he has first seen that the movement can be made in safety does not mean that he may not make a left turn on the highway unless the circumstances be absolutely free from danger, but only that he exercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others.

4. Same—

G.S. 20-154 does not require that a motorist give proper signal before making a left turn on the highway unless the surrounding circumstances afford him reasonable grounds for apprehending that such movement may affect the operation of another vehicle, and in exercising such prevision he may, in the absence of notice to the contrary, assume that other motorists will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care.

5. Same—

Where a motorist makes a left turn across a street, without signaling, to enter a filling station, and makes such turn when a vehicle approaching from the opposite direction is 900 feet away, and is struck by such other vehicle which was traveling at a speed of approximately 70 miles per hour, such motorist does not violate G.S. 20-154, since the motorist had every reason to believe that he could complete his turn with safety to himself and others without affecting in any way the operation of the approaching vehicle.

6. Automobiles § 18d—

Where a motorist makes a left turn across a highway, without signaling, to enter a filling station, when a vehicle approaching from the opposite direction is some 900 feet away, and is struck by such other vehicle which was traveling approximately 70 miles per hour, the negligence of the driver of such other vehicle is the sole proximate cause of the accident.

COOLEY *v.* BAKER.

APPEAL by defendant, William Thomas Baker, from *Burgwyn, Special Judge,* at the September, 1949, Term of NASH.

This action arose out of a collision between a Ford truck driven by the defendant, William Thomas Baker, and a Pontiac Sedan operated by the defendant, Cary K. Bizzell. The accident occurred on South Church Street in the City of Rocky Mount, North Carolina, on 3 April, 1948. The plaintiff, Roger Douglas Cooley, who was a guest in the Ford truck, seeks to hold his host, the defendant Baker, and the driver of the Pontiac Sedan, the defendant Bizzell, jointly liable in damages for personal injuries suffered by him in the collision on the theory that such injuries were the proximate consequence of the concurrent negligence of the defendants. The defendant Baker demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action against him. G.S. 1-127 (6). The portions of the complaint pertinent to this matter are set out in the opinion which follows this statement. The Superior Court entered judgment overruling the demurrer, and the defendant Baker excepted and appealed, assigning that ruling as error.

Cooley & May for plaintiff, appellee.

Wilkinson & King for defendant, William Thomas Baker, appellant.

ERVIN, J. This appeal raises the question whether the complaint affirmatively alleges facts showing actionable negligence on the part of the defendant Baker.

When the complaint is stripped of its legal conclusions, it becomes evident that the plaintiff relies upon the following factual averments to establish liability on the part of Baker:

Immediately before the accident Baker was driving his Ford truck southward on his right-hand half of South Church Street, and Bizzell was operating his Pontiac Sedan northward along his right-hand side of the same thoroughfare. Baker turned his Ford truck to the left for the purpose of entering a service station situated on the east side of South Church Street without giving Bizzell, the driver of the approaching Pontiac Sedan, any signal of his intention to make such left turn. At that time the distance between the Ford truck and the Pontiac Sedan was "approximately 300 yards." The Pontiac Sedan traversed the intervening "distance of approximately 300 yards . . . at a speed of approximately 70 miles per hour," and collided with the Ford truck before Baker "could complete his left turn and cause the truck to enter the premises" of the service station. As a result of the collision, the plaintiff was seriously injured.

The Superior Court adjudged the complaint to charge actionable negligence against the defendant Baker on the hypothesis that its factual

averments disclose these two essential elements: (1) That Baker was negligent in the management of the truck in that he undertook to make a left turn without observing the precautions prescribed by G.S. 20-154; and (2) that his negligence in this respect blended with the concurrent negligence of Bizzell and thereby proximately resulted in injury to plaintiff. It is undoubted law that a motorist is negligent if he violates G.S. 20-154, and that his negligence in that particular is actionable if it proximately causes injury to another. *Banks v. Shepard,* 230 N.C. 86, 52 S.E. 2d 215; *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740; *Bechtler v. Bracken,* 218 N.C. 515, 11 S.E. 2d 721; *Templeton v. Kelley,* 216 N.C. 487, 5 S.E. 2d 555; *Holland v. Strader,* 216 N.C. 436, 5 S.E. 2d 311; *Newbern v. Leary,* 215 N.C. 134, 1 S.E. 2d 384; *Mason v. Johnston,* 215 N.C. 95, 1 S.E. 2d 379; *Smith v. Coach Co.,* 214 N.C. 314, 199 S.E. 90; *Murphy v. Coach Co.,* 200 N.C. 92, 156 S.E. 550.

G.S. 20-154 is in these words:

"(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

"(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any mechanical or electrical signal device approved by the department, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the department.

"Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

"Left turn—hand and arm horizontal, forefinger pointing.

"Right turn—hand and arm pointed upward.

"Stop—hand and arm pointed downward.

"All signals to be given from left side of vehicle during last fifty feet traveled."

In construing statutes, courts assume that legislators take note of the realities when they make laws. The General Assembly adopted G.S. 20-154 to regulate the movement of motor vehicles upon the public highways of the State. Its manifest object is to promote and not to obstruct vehicular travel. In the very nature of things, drivers of motor vehicles act on external appearances. These matters being true, the language of

this statute must be accorded a reasonable and realistic interpretation to effect the legislative purpose.

The statutory provision that "the driver of any vehicle upon a highway before . . . turning from a direct line shall first see that such movement can be made in safety" does not mean that a motorist may not make a left turn on a highway unless the circumstances render such turning absolutely free from danger. It is simply designed to impose upon the driver of a motor vehicle, who is about to make a left turn upon a highway, the legal duty to exercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others before he actually undertakes it. *Jones v. Pritchett,* 232 Ala. 611, 169 So. 224; *Huber v. Scott,* 122 Cal. App. 334, 10 P. 2d 150; *Inouye v. Gilboy Co.,* 115 Cal. App. 25, 300 P. 835; *Duggan v. Byrolly Transp. Co.,* 121 Conn. 372, 185 A. 85; *Enfield v. Butler,* 221 Iowa 615, 264 N.W. 546; *Smith v. Clark,* 187 Va. 181, 46 S.E. 2d 21; *Virginia Electric & Power Co. v. Holland,* 184 Va. 893, 37 S.E. 2d 40.

Moreover, the part of the statute which specifies, in substance, that "whenever the operation of any other vehicle may be affected by such movement," a motorist about to make a left turn on a highway "shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement" does not require the driver of a motor vehicle intending to make a left turn upon a highway to signal his purpose to turn in every case.

The duty to give a statutory signal of an intended left turn does not arise in any event unless the operation of some "other vehicle may be affected by such movement." And even then the law does not require infallibility of the motorist. It imposes upon him the duty of giving a statutory signal of his intended left turn only in case the surrounding circumstances afford him reasonable grounds for apprehending that his making the left turn upon the highway might affect the operation of another vehicle. *Stovall v. Ragland,* 211 N.C. 536, 190 S.E. 899; *Cook v. Gillespie,* 259 Ky. 281, 82 S.W. 2d 347; *Morris v. Dame's Ex'r,* 161 Va. 545, 171 S.E. 662.

In considering whether he can turn with safety and whether he should give a statutory signal of his purpose, the driver of a motor vehicle, who undertakes to make a left turn in front of an approaching motorist, has the right to take it for granted in the absence of notice to the contrary that the oncoming motorist will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care to avoid collision with the turning vehicle. *Gray v. Dierkmann,* 109 F. 2d 382; *Hill v. Union Gas & Electric Co.,* 51 Ohio App. 144, 200 N.E. 199.

This brings us to the task of applying these legal principles to the factual averments of the complaint. When this is done, it appears that

Baker turned his Ford truck to the left when the oncoming Pontiac Sedan was 900 feet away; and that Baker then had every reason to believe that he could complete his left turn and enter the premises of the service station with safety to himself and others, and without affecting in any way the operation of the approaching Pontiac Sedan. This being true, the complaint fails to charge Baker with negligence for it discloses that he did not violate the provisions of G.S. 20-154.

Moreover, the complaint reveals that the sole proximate cause of the plaintiff's injury was the independent negligence of Bizzell.

The judgment overruling the demurrer must be

Reversed.

W. C. KING, ADMINISTRATOR OF THE ESTATE OF GLADYS CALDER, DECEASED, v. WALTER GATES AND STANLEY W. CALDER.

(Filed 8 March, 1950.)

1. Statutes § 12—

The action of the General Assembly in adopting a recodification in which a previous statute is deleted and not brought forward constitutes a repeal of the omitted statute.

2. Husband and Wife § 11—

In this jurisdiction a wife may maintain an action against her husband for negligent injury, or if such injury results in death, her personal representative may maintain such action. G.S. 52-10.

APPEAL by defendant Calder from *Grady, Emergency Judge,* October Term, 1949, of HALIFAX. Affirmed.

This was an action to recover damages for wrongful death of plaintiff's intestate resulting from a collision between an automobile driven by defendant Gates, and an automobile in which plaintiff's intestate was riding, being driven at the time by defendant Calder, her husband. Plaintiff alleged the death of his intestate was caused by the concurrent negligence of both defendants. Defendant Gates answered.

The defendant Calder demurred to the complaint on the ground that an action for damages for a negligent injury to a wife, or by her administrator for her wrongful death, could not be maintained against her husband. The demurrer was overruled and defendant Calder appealed.

Allsbrook & Benton for plaintiff, appellee.

Spruill & Spruill for defendant Stanley W. Calder, appellant.

Battle, Winslow & Merrell for defendant Walter Gates, appellee.

DEVIN, J. The appeal by defendant Calder from the judgment below overruling his demurrer to the complaint presents for determination the question whether now in this jurisdiction a wife may maintain an action for damages for injuries to her person caused by the negligence of her husband.

Prior to 1868 in North Carolina a married woman was not *sui juris* and was incapable of maintaining an action without the joinder of her husband (*Roberts v. Roberts,* 185 N.C. 566, 118 S.E. 9; *Harvey v. Johnson,* 133 N.C. 352, 45 S.E. 644), but in that year by the enactment of the Code of Civil Procedure, section 56, the General Assembly prescribed an exception to this procedural rule, as follows: "When a married woman is a party, her husband must be joined with her, except that (1) when the action concerns her separate property she may sue alone; (2) when the action is between herself and her husband, she may sue or be sued alone." This statute was later codified as C.S. 454.

In 1913 the General Assembly passed an act which was later codified as C.S. 2513, and now G.S. 52-10. This Act provided that: "The earnings of a married woman by virtue of any contracts for her personal services, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

This statute changed the substantive law by establishing her right to maintain an action for "any damages for personal injuries or other tort sustained by her . . . by suing alone," the recovery to be her separate property as fully as if she had remained unmarried, and thus enabled the wife to maintain an action for damages for personal injuries caused by the negligence of her husband. *Roberts v. Roberts, supra; Crowell v. Crowell,* 180 N.C. 516 (520), 105 S.E. 206. On rehearing in the *Crowell case* (181 N.C. 66), the present *Chief Justice,* citing the two statutes above quoted (C.S. 454 and C.S. 2513), used this language: "Considering the two sections together . . . the plaintiff's right to maintain this action (against her husband) is an entirely permissible construction." Thereafter the right of the wife to maintain an action against her husband for negligent injury under the statutes then in force was not questioned. *Etheredge v. Cochran,* 196 N.C. 681 (684), 146 S.E. 711; *Shirley v. Ayers,* 201 N.C. 51, 158 S.E. 840; *Jernigan v. Jernigan,* 207 N.C. 831, 178 S.E. 587; *York v. York,* 212 N.C. 695, 194 S.E. 486; *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162.

But, when the North Carolina statutes were again recodified, under the title of General Statutes of 1943, the General Assembly adopted the report of the Code Commission in which C.S. 454 was deleted and not brought forward. It seems from the report of the commissioners that

this statute was regarded as a duplication and no longer necessary. However, the action of the General Assembly thereon constituted a repeal of the omitted section.

The appellant bases his appeal in this case upon the ground that the ruling in *Crowell v. Crowell,* 181 N.C. 66, 106 S.E. 149, was predicated upon consideration of both statutes, and that the repeal of one left insufficient support for holding now that a wife can maintain a tort action against her husband. As the learned counsel for appellant expressed it, "It took two props to support this legal proposition, and since one has been knocked from under it, the proposition falls of its own weight."

We are unable to adopt appellant's view that both statutes were essential to support a wife's right of action against her husband for damages for a personal injury negligently inflicted by him. The present statute, G.S. 52-10, by its language as interpreted by this Court is sufficient to empower a married woman to maintain an action against her husband for a wrongful or negligent act on his part causing injury to her person. This seems to have been inherent in the latest decision on this subject in *Scholtens v. Scholtens,* 230 N.C. 149, 52 S.E. 2d 350, where *Justice Winborne* in writing the opinion for the Court denying husband's right to sue his wife for tort, refers to the different rule applicable to the wife, saying: "While it is urged that since the wife may sue the husband in such cases, he should be permitted the like right to sue her, sufficient answer for present purposes is, this Court does not make the law."

In *Helmstetler v. Power Co.,* 224 N.C. 821, 32 S.E. 2d 611 (Fall Term, 1944), in an opinion by *Chief Justice Stacy,* the right of a husband to maintain an action for negligent injury to his wife was denied on the ground that the Act of 1913 (G.S. 52-10), transferred this right to the wife and provided for recovery in such action by her suing alone as if unmarried. In *Roberts v. Roberts,* 185 N.C. 566 (570), 118 S.E. 9, *Justice Adams,* in a well-considered opinion upholding the right of the wife to maintain action against her husband for negligent injury, referred to *Crowell v. Crowell,* 180 N.C. 516, 105 S.E. 206, as holding that the Act of 1913 conferred this right upon the wife. And in *Kirkpatrick v. Crutchfield,* 178 N.C. 348 (353), 100 S.E. 602, *Chief Justice Clark* said the Act of 1913 had "settled the law in this state in no uncertain terms."

The legal disability of a married woman was originally based on the common law fiction of the unity of husband and wife. Her legal existence during coverture was deemed incorporated in that of her husband, and neither could sue the other for a personal tort or recover for injuries caused by the negligence of the other.

But the fiction of the wife's merged existence has long since been exploded. Both by statute and by judicial interpretation her disabilities have been removed, and her right to stand on her own feet in court and to

seek redress for personal injuries done her by her husband, or anyone else, has been established. Nor does any principle of public policy in North Carolina now exempt the husband from civil liability for the injury and death of his wife proximately caused by his own negligence.

The judgment of the court below overruling the demurrer of defendant Calder is

Affirmed.

SHERBERT McKINNEY AND WIFE, VAN McKINNEY, v. FRED DENEEN, DOING BUSINESS UNDER THE FIRM NAME OF DENEEN MICA COMPANY; AND SOUTHERN MICA COMPANY, INC.

(Filed 8 March, 1950.)

1. Waters and Watercourses § 3—

A lower proprietor may join in one action separate defendants upon allegations that each washed earth and gravel into the stream which was deposited by the stream on plaintiff's land, resulting in damage.

2. Same: Eminent Domain § 3—

Allegations to the effect that defendants pumped water high into the hills and used it to wash tons of earth into the stream, which sediment was deposited on plaintiff's land by the stream, resulting in the damage complained of, alleges a direct invasion of or entry upon plaintiff's land amounting to a taking or appropriation of their property, and not merely the permitting of sediment to run off into the natural course of the stream.

3. Eminent Domain § 2—

Private property may not be taken even for a public use without compensation. XIV Amendment to the Federal Constitution. Art. I, sec. 17, and Art. I, sec. 35, of the Constitution of N. C.

4. Constitutional Law § 11—

While loss occasioned by restrictions upon the use of property in the exercise of the police power is not compensable, a direct entry upon and appropriation of private property for a public use does not come within this rule.

5. Statutes § 5a—

A statute in derogation of the common law must be strictly construed.

6. Waters and Watercourses § 3: Mines and Minerals § 4b—

G.S. 74-31 does not purport to relieve persons engaged in mining from liability for damages directly resulting to the lands of a lower proprietor from the discharge into the waters of a stream waste and sediment incidental to the mining of kaolin and mica, and demurrer is erroneously sustained in an action by such lower proprietor to recover damages to his land resulting from the deposit from such sediment thereon by the stream.

MCKINNEY *v.* DENEEN.

APPEAL by plaintiffs from *Pless, J.*, October Term, 1949, YANCEY.

Civil action to recover damages resulting from a continuing trespass upon and appropriation of real property and for injunctive relief, heard on demurrers to the complaint.

Plaintiffs allege that they own and occupy a 100-acre farm lying in part along South Toe River, a nonnavigable stream; that the main part of their land, including the residence, lies on the opposite side of the river from Highway 69; that the land for about 300 feet lies on both sides of the river; that there is a private road from the main body of their land across a ford in the stream to the highway; that due to the topography of their tract and surrounding territory the private road furnishes their only practicable means of ingress and egress; that the defendants are nonriparian owners; that they operate mica-washing machines on a hillside about one-half mile upstream above plaintiffs; that in the course of their business they purchase mica-bearing earth, haul it to their plants, and wash the earth, gravel, and mica schist at the rate of hundreds of tons per day into said river above plaintiffs' land; that as a result of the continuing discharge of such matter in said stream the usefulness of their ford has been destroyed, their road has been filled with soft mud which makes it impassable, mud in large drifts has been forced out on their land and other damage to their freehold has resulted.

Each defendant demurred for the causes set out in their written demurrers which appear of record. In pressing their demurrers they rely primarily on the provisions of G.S. 74-31.

The court, being of the opinion that the constitutionality of said Act is the determinative question, entered its decree in part as follows:

"The Court is of the opinion, and so holds, that the said statute constitutes a valid exercise of the police power. The Court further takes judicial notice of the fact that the mica and kaolin industries in Western North Carolina, and particularly in Yancey County, are the greatest source of livelihood and prosperity in the community affected by this litigation, is of the opinion, and so holds, that said statute is constitutional."

It thereupon sustained the demurrers and dismissed the action at the cost of plaintiffs. Plaintiffs excepted and appealed.

R. W. Wilson for plaintiff appellant.

W. E. Anglin for defendant appellee Deneen and Fouts & Watson and J. H. Winston for defendant appellee Southern Mica Company, Inc.

BARNHILL, J. Under the decisions of this Court, there is no misjoinder of parties and causes of action. *Lineberger v. Gastonia,* 196 N.C. 445, 146 S.E. 79; *Stowe v. Gastonia, ante,* 157.

Plaintiffs do not allege merely that defendants, in getting out and washing the products of mica mines, have allowed waste, water and sediment to run off into the natural course of South Toe River. They allege that defendants, in the operation of their plants, pumped "a stream of water through pipes, hose and nozzles and boring into the earth and cutting loose thousands of tons of earth and washing it down into the said stream" and have otherwise discharged into the stream earth, sediment and waste which have materially decreased the value of their property. They further allege that "the acts of the defendants in pumping the water far from the channel of the stream and high onto the hills, and using it to wash out deep cannons (*sic*) through the hills is not similar to the usage made of the waters of the stream by riparian owners who live along the stream . . ."

In short, the plaintiffs allege a direct invasion of and entry upon their land which amounts to a taking or appropriation of their property. They seek compensation therefor.

That a citizen may not be deprived of his property, even for a public use, without compensation is fundamental. U. S. Const., Amend. XIV; N. C. Const., Art. I, sec. 17, Art. I, sec. 35; *Cook v. Mebane,* 191 N.C. 1, 131 S.E. 407; *Wagner v. Conover,* 200 N.C. 82, 156 S.E. 167.

It is true that the government, in the exercise of its police power, may regulate and place restrictions upon the use of property in order to secure the general safety, public welfare, and good morals of the community, and any incidental loss occasioned thereby is not compensable. But a direct entry upon and appropriation of private property for a public use does not come within the rule.

Furthermore, the Act, G.S. 74-31, upon which the defendants rely is in derogation of the common law and must be strictly construed. *In re Pitchi, ante,* 485. While it authorizes persons engaged in the business of mining kaolin and mica to discharge the water used in washing the products, together with the incidental waste and sediment, into the natural courses and streams of the State, it does not purport to relieve such persons from liability for any damages which may directly result therefrom. It would seem to be nothing more than a modification of the prevailing stream pollution law in the interest of miners of kaolin and mica.

Therefore, a consideration of the allegations of the complaint in the light of the statute does not compel the conclusion that plaintiffs have failed to state a good cause of action.

We do not mean to hold at this time that defendants may not offer in evidence facts and circumstances which would sustain the constitutionality of the Act and invoke its application. We merely conclude that the questions defendants here seek to raise by demurrer are not presented

in such manner as to defeat the plaintiffs' cause of action. The force and effect of the Act as applied to this particular case must rest upon the facts developed at the trial, and such questions must be decided, in the first instance, by the court below as they arise in the trial.

The judgment below is

Reversed.

G. H. ELLIS AND POLLIE ELLIS v. JOHN L. BARNES.

(Filed 8 March, 1950.)

1. Deeds § 11—

Each provision of a deed must be given effect in ascertaining the intent of the grantor from the entire instrument unless such provision is in irreconcilable conflict with another, or is contrary to public policy, or runs counter to some rule of law.

2. Deeds § 13a—

A *habendum* which provides that the grantee's fee after the reservation of a life estate should be defeasible if he should die without issue and that the remainder should vest in other children of the grantor upon the happening of the contingency, is not repugnant to a granting clause conveying the fee to the grantee after the reservation of the life estate.

3. Same—

The office of the *habendum* is to define the extent of the ownership in the thing granted, and while it may not contradict the granting clause or introduce a stranger to the premises to take as a grantee, it may lessen, enlarge, explain, or qualify the estate granted in the premises and provide that a stranger take by way of remainder.

4. Same—

A limitation by deed to the heirs of a living person will be construed to be to the children of such person, unless a contrary intention appear. G.S. 41-6.

5. Same—

Grantor conveyed the land in question to her son after the reservation of a life estate, and by *habendum* stipulated that the grantee should have an estate for the term of his natural life and at his death to his issue surviving, with further provision that should he die without issue "then to the living heirs of" the grantor. *Held:* The other children of grantor have a remainder contingent upon the death of the grantee without issue, which interest cannot be defeated by a conveyance executed by the grantee with the joinder of the grantor.

APPEAL by defendant from *Carr, J.*, at November Term, 1949, of WILSON.

This is an action for specific performance.

Pollie Ellis, the owner in fee of the lands involved herein, conveyed the property by deed to her son, G. H. Ellis, on 7 August, 1926, reserving in the granting clause a life estate. The *habendum* is as follows: "To have and to hold the aforesaid lot of land and all privileges and appurtenances thereto belonging, to the said G. H. Ellis upon the following terms and conditions: The said Pollie Ellis hereby reserves a life estate therein for and during the term of her natural life, then to said G. H. Ellis for and during his natural life and at his death to his issue surviving. If he die without issue, then to the living heirs of said Pollie Ellis."

The plaintiffs and the defendant entered into a written agreement, on 15 October, 1949, wherein defendant agreed to pay plaintiff $3,000.00 upon their executing and delivering to him on or before 18 October, 1949, a deed conveying to him a fee simple title to the property free from encumbrances, or if they could not convey a fee simple title therein, then upon their conveying to him free from encumbrances the life estate of Pollie Ellis therein, including the right of any reversion the plaintiff Pollie Ellis may have therein, which is contingent upon G. H. Ellis dying without issue surviving him; and, the life estate of the plaintiff G. H. Ellis in said property, or the fee simple estate of plaintiff G. H. Ellis in said property (subject to the life estate of plaintiff Pollie Ellis), defeasible upon his dying without surviving issue.

It is further stipulated in the contract that it is the intention of the parties that such deed will be acceptable provided it shall convey to the party of the second part (who is the defendant herein), his heirs and assigns, an estate in said property of which he could be divested only upon the contingency of G. H. Ellis dying leaving a child, or children, or descendants of any child or children, surviving him.

The plaintiffs executed and tendered a deed in apt time to the defendant, conveying all their right, title and interest in and to the property, but the defendant refused to accept the deed and pay the agreed price, for the reason as he contends, the deed tendered does not convey such title as he agreed to accept.

Pursuant to motion by the plaintiffs, at the hearing below, judgment was entered on the pleadings, directing the defendant to accept the tendered deed and to pay to the plaintiffs the agreed purchase price. Defendant appeals and assigns error.

Lamb & Lamb for plaintiffs.

Thomas J. Moore for defendant.

DENNY, J. In the interpretation of the provisions of a deed, the intention of the grantor must be gathered from the whole instrument and

every part thereof given effect, unless it contains conflicting provisions which are irreconcilable, or a provision which is contrary to public policy or runs counter to some rule of law. *Willis v. Trust Co.*, 183 N.C. 267, 111 S.E. 163; *Springs v. Hopkins*, 171 N.C. 486, 88 S.E. 774.

There is no conflict or repugnancy between the granting and *habendum* clauses in the deed under consideration, which prevents giving full force and effect to the intent of the grantor as expressed in the *habendum* clause of the deed.

In the case of *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157, *Devin, J.*, in speaking for the Court, said: "The usual office of the *habendum* in a deed is to define the extent of the ownership in the thing granted to be held and enjoyed by the grantee (26 C.J.S., 200, 431); to lessen, enlarge, explain, or qualify the estate granted in the premises (*Seawell v. Hall*, 185 N.C. 80, 116 S.E. 189); but not to contradict or to be repugnant to the estate granted therein (*Bryan v. Eason*, 147 N.C. 284, 61 S.E. 71), though the *habendum* clause may control if it clearly appears the grantor so intended. *Seawell v. Hall, supra;* 84 A.L.R., 1050." *Cf. Pilley v. Smith*, 230 N.C. 62, 51 S.E. 2d 923.

It is well settled that while a stranger to the premises may not be introduced in the *habendum* to take as a grantee, he may take by way of remainder. *Bryant v. Shields, supra,* and cited cases.

The language used by Pollie Ellis in the *habendum* of her deed should be considered in light of the statutory requirement contained in G.S. 41-6, which reads as follows: "A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will."

It would seem, therefore, that "the living heirs of Pollie Ellis," must be interpreted to mean the children of Pollie Ellis. This being so, the legal effect of the *habendum* clause is simply this: To G. H. Ellis for and during his natural life and at his death to his surviving issue. But if he die without issue surviving, then to the surviving children of Pollie Ellis. It follows, therefore, that the living children of Pollie Ellis (and, according to appellant's brief, there are several of them) have an interest in the premises as contingent remaindermen. *Thompson v. Batts*, 168 N.C. 333, 84 S.E. 347.

It is apparent that in the case of *Therrell v. Clanton*, 210 N.C. 391, 186 S.E. 483, the Court regarded "right heirs of Mary E. Parker" as her general heirs and not as her children, which under the common law rule created a reversion by operation of law. 33 Am. Jur., Sec. 195, p. 669. To construe the opinion otherwise, would seem to require the conclusion that the Court simply overlooked or failed to apply the statute, G.S. 41-6. In any event, we do not think the case is controlling on the facts presented on the present record.

In view of what we have said and the cited authorities, we hold that the plaintiffs cannot give a fee simple title to the lands in question, neither can they give a fee simple title, defeasible "only upon the contingency of G. H. Ellis dying leaving a child, or children, or descendants of any child or children surviving him."

The judgment of the court below is

Reversed.

LOUISE COSTON v. SKYLAND HOTEL, INC.

(Filed 8 March, 1950.)

1. Negligence § 4f (1)—

Evidence that a patron at a hotel went to the manager's desk, which was in a corner of the hotel lobby, in continuing attempts to get into communication with a friend she expected to meet her at the hotel for dinner, and received information from the manager as to a phone call previously made by the friend and obtained change from the manager for use in another telephone call, *is held* to show that the patron was an invitee.

2. Negligence § 4f (3)—

The owner owes the duty to a licensee to refrain from willful or wanton negligence and to refrain from doing any act which increases the hazard to the licensee while on the premises, and passive negligence on the part of the owner will not ordinarily give rise to liability.

3. Negligence § 4f (2)—

The owner owes the duty to an invitee to keep the premises in reasonably safe condition for use by the invitee, which means to exercise the care of a reasonably prudent man to keep the premises safe.

4. Negligence § 4f—

Evidence that plaintiff, a patron in a hotel, was an invitee at the time and place in question, and tripped over a wire extending along the floor, and fell to her injury, *is held* sufficient to overrule nonsuit in her action against the hotel to recover for her resulting injury.

PLAINTIFF'S appeal from *Nettles, J.*, Regular August 1949 Term, BUNCOMBE Superior Court.

T. A. Uzzell, Jr., and J. M. Horner for plaintiff, appellant.

Smathers & Meekins and R. L. Whitmire for defendant, appellee.

SEAWELL, J. The plaintiff brought this suit to recover damages for a personal injury alleged to have been brought about by the defendant's negligence, basing her case on the evidence herein summarized. The

appeal is from the judgment of nonsuit on defendant's demurrer at the conclusion of plaintiff's evidence. The defendant offered none.

The defendant was operating a hotel at Hendersonville. The plaintiff, on the day of her injury, entered the lobby of the hotel where she and a friend had agreed to meet and have dinner. The friend was coming from Winston-Salem and had not arrived. There were two booths containing telephones in the lobby, and also the desk of the manager of the hotel. Finding it necessary to use the telephone in one of the booths for the purpose of communicating with her friend, the plaintiff secured change from the manager of the hotel and used the telephone. She then wished to know when the dining room, which opened off the lobby, would close, so that she and her friend might be on time for dinner, and was informed by the manager that it closed at eight o'clock. She then requested that when her friend arrived at the hotel the manager would inform him to wait there until plaintiff returned from a short visit she meantime wished to make to the grocery, and he agreed to do so. Returning from the grocery she ascertained from the manager that her friend had called but that he had not delivered her message. She then secured change from the manager to use again in the telephone booths and asked him the telephone number of the bus station from which her friend had called in order that she might call him, and he undertook to look it up for her in the directory.

The plaintiff this time was in front of the manager's desk and he was in his chair facing her. On being given the number she turned away from the desk and tripped over an electric wire, or cord, leading to the desk lamp, which was extended along the floor, as plaintiff testified, several feet from the desk to which it was attached. She fell violently forward upon the floor, suffering injuries to her nose and head which she claimed to be painful and permanent.

Taken in the most favorable light for the plaintiff, this evidence engenders inferences that she was an invitee in the hotel and not a mere licensee, using only those devices and facilities in the hotel that were reasonably within the invitation extended by a place of that kind for the use of the public generally, and being the recipient from the manager only of those offices which were reasonably within the invitation extended to her, and in the performance of the ordinary duties of his position.

The difference in the care which must be observed by the owner of property toward a mere licensee on the premises and that which is due an invitee is too well settled for extended discussion. Succinctly stated, as distinguished in our own decided cases, the owner owes to the licensee the duty only "to refrain from willful or wanton negligence and from doing any act which increases the hazard to the licensee while he is on the premises." *Dunn v. Bomberger,* 213 N.C. 172, 195 S.E. 364. Passive

negligence will not ordinarily give rise to liability; *Clark v. Cleveland Drug Co.*, 204 N.C. 628, 169 S.E. 217; and the status of the bare licensee has been held to be substantially similar to that of the trespasser. *Jones v. Southern Railway Co.*, 199 N.C. 1, 153 S.E. 637. Duty to an invitee requires that the premises must be kept in reasonably safe condition for use by the invitee. *Drumwright v. Theatres*, 228 N.C. 325, 45 S.E. 2d 379; *Watkins v. Taylor Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917; *Anderson v. Reidsville Amusement Co.*, 213 N.C. 130, 195 S.E. 386; *Brown v. Montgomery Ward & Co.*, 217 N.C. 368, 8 S.E. 2d 199; *Hunt v. Meyers Co.*, 201 N.C. 636, 161 S.E. 74; *Baskin v. Montgomery Ward & Co.*, 104 Fed. 2d 531. And when the term "reasonably" is used in this connection it is not intended thereby to relax the standard of the ordinarily prudent man, by way of euphemism. It means the same thing.

As we have said, the use of the premises and facilities by plaintiff was no more than might be assumed to be within the scope of the invitation, usual with an establishment of that kind, and the visit appears to have been for the ultimate mutual advantage to the parties. *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408. We see no violation of that principle in the approach of the plaintiff to the manager's desk for the purposes declared.

On this point the following from *Coffer v. Bradshaw*, 46 Ga. App. 143, 148, 167 S.E. 119, is pertinent and sound:

> "Where the owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by his failure to exercise ordinary care in keeping the premises and approaches safe."
>
> "The duty of the owner as occupier of premises to keep the premises safe for invitees extends to all portions thereof which the invitee may use in the course of the business for which the invitation is extended." *Sheffield Co. v. Phillips*, 69 Ga. Ap. 41, 24 S.E. 2d 834. 38 Am. Jur., "Negligence," sec. 132, Anno. 100, A.L.R. 715.

We think, considered in the light most favorable to plaintiff, the evidence contains inferences of negligence which should have been submitted to the jury.

The judgment of nonsuit is

Reversed.

STATE v. RALEIGH SPELLER.

(Filed 8 March, 1950.)

1. Constitutional Law § 33—

It is not the right of a defendant to be tried by a jury of his own race or to have a representative of any particular race on the jury, but it is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded.

2. Jury § 3—

Where it is found as a fact by the trial court upon supporting evidence, counsel for defendant having stated that they desire to offer no additional evidence relating thereto, that names of persons of both the white and colored races had been placed in the jury box without discrimination of any kind, his challenge to the array on the ground of racial discrimination is properly overruled.

3. Rape § 4—

Evidence in this case of defendant's guilt of the capital offense of rape, *held* sufficient to overrule defendant's motion to nonsuit.

4. Rape § 5—

Where in a prosecution for rape, the court calls to the jury's attention the fact that it might recommend imprisonment for life, Chap. 299, Session Laws 1949, an exception to the charge on the ground that the court failed to properly call this matter to the attention of the jury is feckless.

APPEAL by defendant from *Halstead, Special Judge,* August Term, 1949, of BERTIE.

Criminal prosecution on indictment charging the defendant with felonious assault and rape upon Mrs. Aubrey Davis, a female.

Verdict: Guilty of rape as charged in the bill of indictment.

Judgment: Death by asphyxiation.

The prisoner appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

Herman L. Taylor and C. J. Gates for defendant.

STACY, C. J. For the third time the defendant appeals from a conviction of rape, without any recommendation from the jury, and sentence of death as the law commands in such cases. On the prior appeals, reported in 229 N.C. 67, 47 S.E. 2d 537, and 230 N.C. 345, 53 S.E. 2d 294, new trials were ordered for jury defect and for failure to allow defendant sufficient time or opportunity to present his challenge to the array.

On the present hearing, all charges of discrimination, jury defect and alleged irregularities, which again constitute the defendant's principal exceptions, have been carefully investigated with ample opportunity afforded the defendant to be heard upon his challenges. At the close of the evidence on the challenges, counsel for the defendant announced "that they desired to offer no additional evidence in support of said motion."

The case was tried at the August Term, 1949, Bertie Superior Court, before a jury selected from a special venire drawn from Vance County at the instance of the defendant. "Defendant's counsel suggested that the venire from which the said jury should be selected be summoned from the most remote county in the Third Judicial District, the same being Vance County." (Judge's findings, R. p. 58.)

It was made to appear that on the first Monday in July, 1949, the Commissioners of Vance County had purged the jury list of their county and in full compliance with the law had placed the names of persons of both the white and colored races in the jury box without discrimination of any kind. On the special venire drawn to try the instant case there appeared the names of seven Negroes, the race to which the defendant belongs. It is not the right of any party to be tried by a jury of his own race, or to have a representative of any particular race on the jury. It is his right, however, to be tried by a competent jury from which members of his race have not been unlawfully excluded. *S. v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77; *Ballard v. U. S.,* 329 U.S. 187, 91 L. Ed. 181. No such exclusion appears here. The challenge to the array was properly overruled on the findings made by the trial court, which are amply supported by the evidence and are without sufficient challenge under the rules.

We omit any recitation of the evidence in the case as it is of a sordid nature. Moreover, it has heretofore been sufficiently set out and its challenge by demurrer ruled upon. The motion for judgment as in case of nonsuit was properly overruled. *S. v. Speller,* 230 N.C. 345, 53 S.E. 2d 294.

The exceptions to the charge are feckless and are patently without merit. They are not sustained. The court was careful to call to the attention of the jury Chap. 299, Session Laws 1949, providing that "if the jury shall so recommend at the time of rendering its verdict in open court, the punishment for rape shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." Notwithstanding the instruction, the jury did not see fit to make such a recommendation.

On the record as presented, the verdict and judgment will be upheld.

No error.

MONTAGUE BROTHERS, INC., A CORPORATION, v. W. C. SHEPHERD COMPANY, INC., A CORPORATION; A. L. HUSSEY; AND BANK OF MANSFIELD, INTERVENOR.

(Filed 22 March, 1950.)

1. Chattel Mortgages and Conditional Sales § 8a—

A chattel mortgage or conditional sales contract is valid as against creditors or purchasers for value as of the time of registration in the proper county, and registration in any county other than that specified by law is of no effect. G.S. 47-20, G.S. 47-23.

2. Same—

Where a chattel mortgage or conditional sales contract is registered in the proper county, subsequent change of residence of the mortgagor or vendee, or subsequent removal of the property to another county of the State, does not affect the lien, there being no requirement of a second registration in this State in either of these events.

3. Same—

Where the owner of the equity is a nonresident, a chattel mortgage or conditional sale on the property must be registered in the county where the property is situate at the time of the registration, and evidence that a truck was sold under a conditional sales contract in a certain county in this State and was thereafter used in said county by the vendee until after the date the conditional sales contract was registered in that county, is sufficient to support the finding by the jury that the truck was situated in such county at the time of registration.

4. Same—

The objective of the registration statutes is to give notice to creditors and purchasers for value from the mortgagor or vendee, and therefore the county of registration is that where interested parties would ordinarily look for information in regard thereto, *i.e.*, the county of the mortgagor's or vendee's residence, or, in case he is a nonresident, the county where the chattel is situated. G.S. 47-20, G.S. 47-23.

5. Same—

A chattel is situated within the meaning of the registration statutes where it is regularly used day by day, or where it is regularly kept when not in actual use.

APPEAL by defendant, W. C. Shepherd Company, Inc., and intervenor, Bank of Mansfield, from *Bone, J.*, and a jury, at October Term, 1949, of WAYNE.

Civil action involving conflicting claims to priority of liens on a motor truck.

These matters have been established by the judicial admissions of the parties:

1. G. B. Walker was a nonresident of North Carolina during the transactions set out below.

2. On 17 July, 1947, the plaintiff, Montague Brothers, Inc., a motor vehicle dealer in Wayne County, North Carolina, sold the truck to Walker under a conditional sales contract whereby it retained title as security for the contract price. The sum of $950.60 is now due the plaintiff by Walker on the contract price. The conditional sales contract was registered in the office of the Register of Deeds of Wayne County on 1 August, 1947.

3. On 29 January, 1948, Walker appeared before a notary public in Wayne County and acknowledged the execution of these mortgages covering the truck as security for debts: (1) A chattel mortgage to the Carroll Realty and Insurance Company, of Carrollton, Georgia, which was antedated 31 May, 1947, and recorded in the office of the Register of Deeds of Lenoir County, North Carolina, on 12 February, 1948; and (2) a chattel mortgage to the Bank of Mansfield, of Newton County, Georgia, which was antedated 11 June, 1947, and registered in the office of the Register of Deeds of Lenoir County, North Carolina, on 24 February, 1948. The Carrollton Realty and Insurance Company assigned its debt and chattel mortgage to the defendant, W. C. Shepherd Company, and Walker now owes this defendant $1,010.00 thereon. The sum of $1,089.00 is still due the Bank of Mansfield by Walker on the debt secured by its chattel mortgage.

The plaintiff brought this action against the defendants, W. C. Shepherd Company and A. L. Hussey, to obtain possession of the truck under its conditional sales contract, alleging that such contract constituted a first lien on the truck because it was situated in Wayne County when the contract was registered and suing out ancillary claim and delivery process for the truck, which was in the possession of the defendants. The plaintiff prayed that the truck be sold under decree, and the proceeds of its sale be applied to the satisfaction of its claim against Walker.

Hussey did not defend. The W. C. Shepherd Company gave an undertaking for replevy, and retained the truck pending the trial. It and the Bank of Mansfield, which intervened in the action, made common cause against the plaintiff, alleging that the conditional sales contract was invalid as to them on the ground that the truck was not situated in Wayne County when such contract was registered. They asserted that the chattel mortgage of the W. C. Shepherd Company and the chattel mortgage of the Bank of Mansfield were respectively the first and second liens on the truck, and prayed for the sale of the truck and the application of the proceeds of its sale to the payment of their claims against Walker in that order of priority.

The legal battle in the court below centered around the question of whether the truck was situated in Wayne County at the time of the registration of the plaintiff's conditional sales contract. The only evi-

dence at the trial relating to the location of the truck prior to 15 August, 1947, was presented by the plaintiff. This testimony tended to show that the plaintiff purchased the truck in Detroit, Michigan, and brought it to the plaintiff's garage in Wayne County the latter part of May, 1947; that the truck remained in such garage until 17 July, 1947; that it was then sold to Walker under the conditional sales contract; and that the truck was used for hauling asphalt in road work which Walker was performing for the W. C. Shepherd Company in Wayne County from that time until about April, 1948.

The defendant, W. C. Shepherd Company, and the intervenor offered evidence indicating that the truck was used in road work in Duplin County, North Carolina, from "the middle of August . . . up until the first week ending in September, 1947," and that thereafter it was employed in similar work in Lenoir County, North Carolina.

Issues were submitted to and answered by the jury as follows:

"1. Was the conditional sales agreement of the plaintiff referred to in the complaint duly executed and registered according to law in the proper county? Answer: Yes.

"2. Is the plaintiff entitled to the immediate possession of the truck described in said conditional sales agreement? Answer: Yes.

"3. Is the defendant, W. C. Shepherd Company, Inc., in the wrongful possession of the aforesaid motor truck? Answer: Yes.

"4. What was the value of the said motor truck at the time of its seizure under the Writ of Claim and Delivery? Answer: $950.60."

Judgment was entered on the verdict in favor of the plaintiff, and the defendant, W. C. Shepherd Company, and the intervenor appealed, asserting in their assignments of error that the plaintiff's evidence was insufficient to establish the proposition that the truck was situated in Wayne County at the time of the registration of the conditional sales contract.

Scott B. Berkeley for the plaintiff, appellee.

James N. Smith for the defendant, W. C. Shepherd Company, and the intervenor, Bank of Mansfield, appellants.

ERVIN, J. Chattel mortgages and conditional sales are nearly allied to each other. *Poindexter v. McCannon,* 16 N.C. 373, 18 Am. Dec. 591. For this reason, G.S. 47-20, which covers chattel mortgages, and G.S. 47-23, which embraces conditional sales, prescribe identical requirements for their recording. These statutes expressly provide that a chattel mortgage or a conditional sale of tangible personal property is valid as against creditors or purchasers for a valuable consideration from the mortgagor or vendee only from its registration in the county where the mortgagor or

vendee resides if he resides in the State, or in the county where the property is situated if he resides out of the State.

Under these statutes, such an instrument takes effect as against such interested third persons from and after its registration in the place appointed by law as if it had been then and there executed. *Finance Corp. v. Hodges,* 230 N.C. 580, 55 S.E. 2d 201. This being so, the recordation of a chattel mortgage or a conditional sale in any county other than that specified by law is of no effect. *Discount Corporation v. Radecky,* 205 N.C. 163, 170 S.E. 640; *Foy v. Hurley,* 172 N.C. 575, 90 S.E. 582; *Bank v. Cox,* 171 N.C. 76, 87 S.E. 967; *Weaver v. Chunn,* 99 N.C. 431, 6 S.E. 370.

Since the place where the law requires it to be recorded is fixed by either the residence of its maker or the location of the property covered by it at the time of its registration, a chattel mortgage or a conditional sale, which is originally registered in the proper county, retains its full legal vigor in case the maker afterwards changes his residence to some other place within the State, or the property is subsequently removed to another county. *Smoak v. Sockwell,* 152 N.C. 503, 67 S.E. 994; *Barrington v. Skinner,* 117 N.C. 48, 23 S.E. 90; *Hornthal v. Burwell,* 109 N.C. 10, 13 S.E. 721, 26 Am. S. R. 556, 13 L.R.A. 740; *Harris v. Allen,* 104 N.C. 86, 10 S.E. 127; 10 Am. Jur., Chattel Mortgages, section 95; 14 C.J.S., Chattel Mortgages, section 155. There is no requirement of a second recordation in this State in either of these events. *Harris v. Allen, supra.*

As Walker was a nonresident of the State, the trial court rightly made the case to turn upon the question whether the truck was situated in Wayne County within the meaning of the law at the time of the registration of the plaintiff's conditional sale contract, *i.e.,* on 1 August, 1947. *Sloan Bros. v. Sawyer-Felder Co.,* 175 N.C. 657, 96 S.E. 39.

Although G.S. 47-20 was enacted in 1829 and G.S. 47-23 was adopted in 1883, we have found no decision in this jurisdiction establishing any practical criterion for determining when a specific chattel is situated in a particular place. *Credit Corporation v. Walters,* 230 N.C. 443, 53 S.E. 2d 520, does not do so. Indeed, it does not deal with the precise problem which confronts us. It is concerned with a question of conflict of laws, and rightly adjudicates that a moveable chattel does not lose its original *situs* in one State until it acquires "a more or less permanent location" elsewhere.

Standard lexicographers define "situated" as "having a site or location; located." The word ordinarily implies more than mere temporary presence. 58 C.J. 741. The significance of the term in the statutes relating to the recording of chattel mortgages and conditional sales of tangible

personal property becomes plain when due heed is paid to the reasons for their enactment.

These statutes are designed to give notice of the mortgage or conditional sale to persons of the classes mentioned therein, *i.e.,* creditors and purchasers for a valuable consideration from the mortgagor or vendee, and "to prevent fraud and deception by protecting them from the effects of secret liens and from losses which they might otherwise sustain by relying upon the possession and apparent ownership of the chattels in the mortgagor" or vendee. 10 Am. Jur., Chattel Mortgages, section 83. See, also: *Drill Co. v. Allison,* 94 N.C. 549.

In adopting these statutes, the Legislature took into account the palpable fact that a chattel, unlike land, has no fixed or permanent location, and endeavored to procure the registration of each chattel mortgage or conditional sale in the place where third persons interested in the state of title to a chattel ostensibly owned by the mortgagor or vendee would ordinarily look for information on that point.

The requirement that such an instrument is to be recorded in the county where its maker has his actual personal residence is based on the legislative realization that "persons interested to have knowledge in such respect would go to the county where a person resides to see what disposition he had made of his personal property by deeds and other instruments required to be registered." *Bank v. Cox, supra.*

In fixing the place for registration of a chattel mortgage or a conditional sale executed by a mortgagor or vendee residing out of the State, the Legislature acted upon the assumption that persons interested in a chattel ostensibly owned by a nonresident will seek information in respect to the title to such chattel in the place where such chattel is likely to be found under normal conditions. For this reason, it incorporated in the recording statutes the provision which specifies that a chattel mortgage or a conditional sale made by a nonresident is to be registered in the county where the chattel is situated. This necessarily implies that the chattel is situated where it is regularly kept and maintained; for that is the place where it is likely to be found under normal conditions. *Century Ins. Co., Limited, v. Glidden Buick Corporation,* 174 Misc. 149, 20 N.Y.S. 2d 108. Hence, we conclude that a chattel is situated within the meaning of the recording acts where it is regularly used day by day, or where it is regularly kept when not in actual use. *Lathe v. Schoff,* 60 N.H. 34; Jones on Chattel Mortgages and Conditional Sales (6th Ed.), section 255.

When these principles are applied to the instant case, it is manifest that the testimony adduced by the plaintiff was sufficient to support the determinative finding of the jury that the truck was situated in Wayne County at the time of the registration of the conditional sales contract

under which the plaintiff claims. The exceptions of the appellants are, therefore, overruled.

Judges must interpret and apply statutes as they are written. We have performed this task.

Nevertheless, we think it not altogether beside the mark to observe that chattels were virtually localized at the time of the adoption of our recording statutes. Nowadays, however, a substantial part of the resources of the people is invested in automobiles, whose utility and value consist solely in their high degree of mobility. In instances without number, the exigencies of industry drive automobiles from place to place at short intervals, affording their ostensible owners rare opportunities to victimize innocent third persons. For this reason, students of commercial problems suggest that the recordation statutes as they pertain to the mortgage or sale of automobiles on credit are outmoded, and ought to be replaced by a central system for registering automobile liens covering the entire State. 26 N.C.L.R. 173. This is a matter, however, which falls within the legislative realm.

The trial and judgment will be upheld; for there is in law

No error.

C. J. SHEFFIELD AND E. L. SHEFFIELD, TRADING AS SHEFFIELD MOTOR COMPANY, AND UNIVERSAL COMMERCIAL INVESTMENT TRUST CORPORATION, v. G. B. WALKER, W. C. SHEPHERD CONSTRUCTION COMPANY, AND GLOBE INDEMNITY COMPANY.

(Filed 22 March, 1950.)

1. Domicile § 1—

"Residence" means a person's actual place of abode, whether permanent or temporary; "domicile" denotes a person's permanent dwelling place to which, when absent, he has the intention of returning. Therefore, a person may have his residence in one place, and his domicile in another.

2. Chattel Mortgages and Conditional Sales § 8—

The word "residence" as used in G.S. 47-20, G.S. 47-23, imports less than domicile and more than physical presence in the character of a mere transient, and means a fixed abode for the time being, or actual personal residence.

3. Same—

The provisions of G.S. 47-20 and G.S. 47-23, that a conditional sales contract or chattel mortgage be registered in the county of the residence of the vendee or mortgagor, require registration in the county of his residence as distinguished from domicile to effectuate the purpose of the statutes to give notice to interested parties.

4. Same—

Evidence that the vendee in a conditional sales contract had his domicile in another state but that he came to a county in this State in pursuing his regular occupation, and that for a short time before, at the time of, and a few days after the registration of the contract, ate and slept at fixed places in a village in the county in which the instrument was registered, is sufficient to be submitted to the jury on the question of whether the instrument was registered in the county of the vendee's residence.

APPEAL by defendant, W. C. Shepherd Construction Company, from *Bone, J.*, and a jury, at the October Term, 1949, of WAYNE.

Civil action involving conflicting claims to priority of liens on a truck.

For convenience of narration, the plaintiffs, C. J. Sheffield and E. L. Sheffield, trading as the Sheffield Motor Company, are called the Sheffield Company; the plaintiff, Universal Commercial Insurance Trust Corporation, is designated as the Universal Corporation; and the defendant, W. C. Shepherd Construction Company, is referred to as the Shepherd Company.

The complaint alleges facts sufficient to entitle the plaintiffs to the relief they seek, to wit: (1) A judgment against the defendant, G. B. Walker, for $994.58 as a debt secured by a conditional sales contract on a Ford truck; and (2) the possession of such truck for sale under the conditional sales contract for the satisfaction of the judgment. The defendant Walker was served by publication, and did not defend. The defendant, the Shepherd Company, answered, averring facts ample to justify it in retaining the Ford truck as the mortgagee named in a chattel mortgage. The plaintiffs invoked the ancillary writ of claim and delivery to take immediate custody of the truck, but the defendant, the Shepherd Company, retained its possession under a bond for replevy whereon the defendant, Globe Indemnity Company, is surety.

Testimony offered by plaintiffs at the trial was sufficient to establish these matters: On 5 September, 1947, the plaintiff, Sheffield Company, a dealer in motor vehicles in Duplin County, sold the Ford truck to the defendant, G. B. Walker, under a conditional sales contract whereby the Sheffield Company retained title as security for the contract price. This conditional sales contract was registered in the office of the Register of Deeds of Duplin County on 11 September, 1947. The Sheffield Company assigned the contract price and the conditional sales contract securing it to the plaintiff, the Universal Corporation, under an agreement whereby the Sheffield Company guaranteed the payment of the contract price by Walker. Walker defaulted in the payment of the contract price, leaving $994.58 due thereon. The Ford truck was worth at least $1,000.00 at the time of its seizure under the writ of claim and delivery.

Evidence presented by the defendant, the Shepherd Company, indicated that the truck was regularly kept and used in Lenoir and Wayne Counties, North Carolina, from 15 September, 1947, until 27 April, 1948; that meanwhile, *i.e.*, on 23 January, 1948, the defendant Walker executed a chattel mortgage to the defendant, the Shepherd Company, as security for a debt; and that immediately afterwards such chattel mortgage was registered in Lenoir and Wayne Counties.

The complaint predicated the propriety of the registration of the conditional sales contract in Duplin County solely upon the allegation that Walker was a resident of Duplin County at the time of its recording.

The only testimony relating to the whereabouts of Walker prior to 15 September, 1947, was adduced by the plaintiffs, who conceded that Walker claimed that his permanent home was at Lynchburg, Virginia. This evidence tended to show that Walker was a road contractor, who moved from place to place as highway work became available; that he actually engaged in road construction in Duplin County from about 1 July, 1947, until 14 September, 1947; and that during this entire period he ate and slept at fixed places in the village of Beulaville in Duplin County. The defendant, the Shepherd Company, offered evidence indicating that Walker did highway work in Lenoir and Wayne Counties from 15 September, 1947, until 23 January, 1948, and that since that time his whereabouts have been unknown.

Issues were submitted to and answered by the jury as follows:

"1. Was the conditional sales contract of the plaintiffs referred to in the complaint duly executed and registered according to law? Answer: Yes.

"2. In what amount, if any, is the defendant G. B. Walker indebted to the plaintiffs on said conditional sales contract? Answer: $994.58.

"3. Are plaintiffs entitled to the immediate possession of the 1947 Ford truck described in the complaint? Answer: Yes.

"4. Is the defendant W. C. Shepherd Construction Company in the wrongful possession of said Ford truck? Answer: Yes.

"5. What was the fair market value of the said Ford truck at the time of the seizure thereof by the Sheriff under the writ of Claim and Delivery? Answer: $1,000.00."

Judgment was entered on the verdict in favor of the plaintiffs, and the defendant, the Shepherd Company, excepted and appealed, assigning as errors the denial of its motions for a compulsory nonsuit and certain excerpts from the charge.

R. D. Johnson and J. Faison Thomson for the plaintiff, appellees.

James N. Smith for the defendant, the Shepherd Company, appellant.

ERVIN, J. Chattel mortgages and conditional sales are nearly allied to each other. *Poindexter v. McCannon,* 16 N.C. 373, 18 Am. Dec. 591. For this reason, G.S. 47-20, which covers chattel mortgages, and G.S. 47-23, which embraces conditional sales, prescribe identical requirements for their recording. These statutes provide that a chattel mortgage or a conditional sale of tangible personal property is valid as against creditors or purchasers for a valuable consideration from the mortgagor or vendee only from and after its registration in the county where the mortgagor or vendee resides if he resides in the State, or in the county where the property is situated if he resides out of the State.

Since there is no allegation and proof that the Ford truck was situated in Duplin County at the determinative time, the primary question raised by this appeal is simply this: Was the testimony presented by the plaintiffs at the trial sufficient to sustain the proposition that Walker resided in Duplin County when the conditional sale was registered, *i.e.,* on September 11, 1947?

It was well said by the late *Justice Oliver Wendell Holmes* that "a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 38 S. Ct. 158, 62 L. Ed. 372. This aphorism finds abundant exemplification in the word "residence," which has many shades of meaning, ranging all the way from mere temporary presence to the most permanent abode. 17 Am. Jur., Domicil, section 9.

"Residence" is sometimes synonymous with "domicile." But when these words are accurately and precisely used, they are not convertible terms. *Thayer v. Thayer,* 187 N.C. 573, 122 S.E. 307. "Residence" simply indicates a person's actual place of abode, whether permanent or temporary; "domicile" denotes a person's permanent dwelling-place, to which, when absent, he has the intention of returning. *Owens v. Chaplin,* 228 N.C. 705, 47 S.E. 2d 12; *Roanoke Rapids v. Patterson,* 184 N.C. 135, 113 S.E. 603. Hence, a person may have his residence in one place, and his domicile in another. *Wheeler v. Cobb,* 75 N.C. 21.

When due heed is paid to both the legislative purpose and the context, the meaning of the statutory requirement under scrutiny becomes plain. G.S. 47-20 and G.S. 47-23 are designed to give notice of chattel mortgages and conditional sales to third persons; and the requirement that such instruments are to be registered in the county where the maker resides is based on the legislative realization that "persons interested to have knowledge in such respect would go to the county where a person resides to see what disposition he has made of his personal property by deeds and other instruments required to be registered." *Bank v. Cox,* 171 N.C. 76, 87 S.E. 967.

Manifestly, the recordation of a chattel mortgage or a conditional sale at the domicile of the maker would not be likely to give notice to third persons unless the place of his domicile and the place of his actual abode happen to coincide. Moreover, the end in view could not be attained by permitting registration in a place when the maker is physically present in the character of a mere transient. It thus appears that under these statutes "residence" means something more than a mere physical presence in a place, and something less than a domicile. The term clearly imports a fixed abode for the time being. For these reasons, it has been established by well considered decisions that G.S. 47-20 and G.S. 47-23 require a chattel mortgage or conditional sales contract executed by a resident mortgagor or vendee to be recorded in the county where he has *his actual personal residence. Discount Corporation v. Radecky,* 205 N.C. 163, 170 S.E. 640; *Bank v. Cox, supra; Weaver v. Chunn,* 99 N.C. 431, 6 S.E. 370.

These things being true, it is manifest that the testimony adduced by the plaintiffs at the trial was sufficient to warrant a finding that the defendant Walker had his actual personal residence in Duplin County at the time of the registration of the conditional sales contract. Consequently the court below rightly refused to dismiss the action upon a compulsory nonsuit.

The exceptions to the charge present no novel questions and are without substantial merit.

The trial and judgment are sustained; for there is in law

No error.

IN THE MATTER OF GRACE HAYES WINGLER.

(Filed 22 March, 1950.)

1. Public Officers § 5b—

A *de jure* judge is one who possesses the legal qualifications for the judicial office in question, has been lawfully chosen, and has qualified himself to perform the duties of such office according to the mode prescribed by law.

2. Public Officers § 5a—

A *de facto* judge is one who assumes to be the judge of a court established by law, has possession of the judicial office in question and discharges its duties, and has a fair color of right or title to the judicial office or has acted as its occupant for so long a time and under such circumstances of reputation and acquiescence by the public generally as to give rise to the supposition that he is the judge he assumes to be, but whose incumbency is illegal in some respect.

3. Public Officers § 5c—

A usurper is one who undertakes to act officially without any actual or apparent authority.

4. Public Officers § 9—

Where the validity of an act of a person acting in a judicial office is collaterally attacked, the court may inquire into his right to the judicial office only so far as to determine whether he is a usurper on the one hand or a *de jure* or *de facto* officer on the other, since if he be a *de facto* officer his acts are binding on the public generally, G.S. 128-6, and are not subject to collateral attack, but may be questioned only in a direct proceeding brought against him for that purpose by the Attorney-General in the name of the State, G.S. 1, Article 41, while if he be a usurper his acts are absolutely void and can be impeached at any time in any proceeding.

5. Statutes § 1c: Courts § 8—

Section 29 of Article II of the Constitution of N. C. forbidding the establishment of courts inferior to the Superior Court by any local, private, or special act, did not become a part of the Constitution until it was adopted by the qualified voters of the State in the general election in 1916, and therefore the General Assembly of 1913 acted within its constitutional limits in creating the Special Court of the Town of North Wilkesboro (Chap. 144, Private Laws of 1913), Art. IV, Sections 2, 12, Constitution of N. C.

6. Public Officers § 9: Judges § 1—

The mayor of a municipality was constituted a Special Court for the municipality by valid act (Chap. 144, Private Laws of 1913). A duly elected and qualified mayor assumed the duties as judge of the Special Court under claim of authority. By Chap. 1142, Session Laws of 1949, it was provided that said judge should be appointed by the Commissioners of the town, and that he should hold no other office. The town commissioners failed to appoint a judge under the provisions of this act. *Held:* A sentence imposed by the mayor acting as judge of the Special Court cannot be collaterally attacked in *habeas corpus*, since he was at least a judge *de facto* if not *de jure*, G.S. 128-6, G.S. 128-7

REVIEW upon *certiorari* of judgment of *Rudisill, J.*, at Chambers in Newton, on 23 November, 1949, in *habeas corpus* proceeding involving the detention of the petitioner, Grace Hayes Wingler, in the common jail of Wilkes County.

The Special Court of the Town of North Wilkesboro was created by Chapter 144 of the Private Laws of 1913, which provides that "the Mayor of the Town of North Wilkesboro is hereby constituted a Special Court" with jurisdiction of all misdemeanors committed within the municipality or within two miles from its corporate limits, and that "any person convicted. . . in said court shall have the right of appeal to the Superior Court of Wilkes County," where trial is to be had *de novo*. This statute was amended by Chapter 1142 of the 1949 Session Laws in

these particulars: (1) "In lieu of the mayor acting in the capacity of judge of the special court constituted under the provisions of this act . . ., the judge of said court shall be appointed by the Town Commissioners of the Town of North Wilkesboro . . . Said judge shall be appointed as herein provided on the First Tuesday after the First Monday in June, 1949, and biennially thereafter, and shall hold office for a period of two years or until his successor is duly elected and qualified"; and (2) "the Judge of said court shall hold no other office either with the State of North Carolina, the County of Wilkes, or the Town of North Wilkesboro."

R. T. McNeil was elected Mayor of the Town of North Wilkesboro for a term of two years on 2 May, 1949, and within five days thereafter was admitted and sworn into such office by the proper authority. Ever since that time, he has performed all of the duties devolving upon the Mayor of the Town of North Wilkesboro and the Judge of the Special Court of the Town of North Wilkesboro under the claim that he has the authority to serve in such capacities by virtue of his election and subsequent qualification as Mayor. The Town Commissioners of the Town of North Wilkesboro have never undertaken to appoint any person Judge of the Special Court under the provisions of Chapter 1142 of the 1949 Session Laws.

On 3 October, 1949, the petitioner, Grace Hayes Wingler, was convicted in the Special Court of the Town of North Wilkesboro upon a warrant charging her with the commission of a misdemeanor within the bounds of the municipality. Mayor McNeil, acting as Judge of the Special Court, pronounced sentence against the petitioner, and she appealed to the Superior Court of Wilkes County. Mayor McNeil committed her to the common jail of Wilkes County pending her appeal because of her inability to give a bond with surety for her appearance at the next term of the Superior Court.

The petitioner then obtained a writ of *habeas corpus* from Judge Rudisill, upon a petition alleging that under Chapter 1142 of the 1949 Session Laws Mayor McNeil had no authority or capacity to act as Judge of the Special Court of the Town of North Wilkesboro after the first Monday in June, 1949, *i.e.*, 7 June, 1949, and that by reason thereof her trial, sentence, appeal, and commitment were void. At the hearing on the return to the writ of *habeas corpus,* Judge Rudisill accepted the contention of the petitioner as valid, and entered judgment discharging the petitioner from custody.

On the first day of the present term of this Court, the Attorney-General, acting for the State, applied for a writ of *certiorari,* alleging error in the judgment ordering the petitioner released from custody. The application was allowed, and the writ accordingly issued.

Attorney-General McMullan for the State.

Trivette, Holshouser & Mitchell and J. H. Whicker, Jr., for the Town of North Wilkesboro, amicus curiæ.

ERVIN, J. A person who undertakes to exercise the functions of a judicial office on a particular occasion may be a judge *de jure,* or a judge *de facto,* or a mere intruder.

Since he is exercising the office of a judge as a matter of right, a judge *de jure* meets this three-fold test: (1) He possesses the legal qualifications for the judicial office in question; (2) he has been lawfully chosen to such office; and (3) he has qualified himself to perform the duties of such office according to the mode prescribed by law. These things being true, he has a complete title to his office; his official acts are valid; and he cannot be ousted. *Norfleet v. Staton,* 73 N.C. 546, 21 Am. R. 479.

A judge *de facto* may be defined as one who occupies a judicial office under some color of right, and for the time being performs its duties with public acquiescence, though having no right in fact. Cooley: Constitutional Limitations (8th Ed.), Vol. 2, page 1355. A person will be deemed to be a *de facto* judge when, and only when, these four conditions concur: (1) He assumes to be the judge of a court which is established by law; (2) he is in possession of the judicial office in question, and is discharging its duties; (3) his incumbency of the judicial office is illegal in some respect; and (4) he has at least a fair color of right or title to the judicial office, or has acted as its occupant for so long a time and under such circumstances of reputation or acquiescence by the public generally as are calculated to afford a presumption of his right to act and to induce people, without inquiry, to submit to or invoke official action on his part on the supposition that he is the judge he assumes to be. For all practical purposes, a judge *de facto* is a judge *de jure* as to all parties other than the State itself. His right or title to his office cannot be impeached in a *habeas corpus* proceeding or in any other collateral way. It cannot be questioned except in a direct proceeding brought against him for that purpose "by the Attorney-General in the name of the State, upon his own information or upon the complaint of a private person," pursuant to the statutes embodied in Article 41 of Chapter 1 of the General Statutes. So far as the public and third persons are concerned, a judge *de facto* is competent to do whatever may be done by a judge *de jure.* In consequence, acts done by a judge *de facto* in the discharge of the duties of his judicial office are as effectual so far as the rights of third persons or the public are concerned as if he were a judge *de jure.* The principles enunciated in this paragraph arose at common law, and have been accorded full recognition in this State. *S. v. Harden,* 177 N.C. 580, 98 S.E. 782; *S. v. Shuford,* 128 N.C. 588, 38 S.E. 808;

S. v. Turner, 119 N.C. 841, 25 S.E. 810; *Hughes v. Long,* 119 N.C. 52, 25 S.E. 743; *Van Amringe v. Taylor,* 108 N.C. 196, 12 S.E. 1005, 23 Am. S. R. 51, 12 L.R.A. 202; *S. v. Lewis,* 107 N.C. 967, 12 S.E. 457, 13 S.E. 247, 11 L.R.A. 100; *S. v. Speaks,* 95 N.C. 689; *Norfleet v. Staton, supra; Ellis v. Institution,* 68 N.C. 423; *Culver v. Eggers,* 63 N.C. 630; *Swindell v. Warden,* 52 N.C. 575; *Commissioners v. McDaniel,* 52 N.C. 107; *Burton v. Patton,* 47 N.C. 124, 62 Am. D. 194; *Gilliam v. Reddick,* 26 N.C. 368; *Burke v. Elliott,* 26 N.C. 355, 42 Am. D. 142.

Moreover, the Legislature has conferred express approval upon the *de facto* doctrine in the case of persons actually inducted into office in the manner prescribed by law. A statute, which had its genesis in Chapter 38 of the Laws of 1844 and is now codified as G.S. 128-6, provides that "any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void."

A usurper is one who undertakes to act officially without any actual or apparent authority. Since he is not an officer at all or for any purpose, his acts are absolutely void, and can be impeached at any time in any proceeding. *S. v. Shuford, supra; Van Amringe v. Taylor, supra; Norfleet v. Staton, supra; Keeler v. New Bern,* 61 N.C. 505.

Practical procedural rules have been devised to enforce these principles in actual litigation. Where the validity of an act of a person acting in a judicial office on a particular occasion is assailed in a collateral proceeding before another court on the theory that he had no right to the office, the court may inquire into his title to the judicial office far enough to determine whether he was a judge *de jure,* or a judge *de facto,* or a mere usurper at the time he performed the act in question. If such inquiry reveals that he was at least a judge *de facto* at that time, the court can proceed no further in its investigation of the title to the office; for the official act of a judge *de facto* is as binding as that of a judge *de jure. U. S. v. Alexander,* 46 F. 728.

When these legal principles are laid alongside the record in this proceeding, it is immediately evident that Mayor McNeil did not act as a mere usurper in trying the petitioner and committing her to jail. He was undoubtedly a judge *de jure* from the time of his qualification as Mayor until 7 June, 1949. As the Town Commissioners did not appoint anyone to succeed him in the judgeship of the Special Court under Chapter 1142 of the 1949 Session Laws, a cogent argument might be advanced to sustain the proposition that he has remained a judge *de jure* since 7 June, 1949, under G.S. 128-7, which stipulates that "all officers shall continue in their respective offices until their successors are elected

or appointed, and duly qualified." *Markham v. Simpson,* 175 N.C. 135, 95 S.E. 106.

Be this as it may, it cannot be gainsaid that Mayor McNeil was at least a judge *de facto* when he took the official action resulting in this proceeding. Since Section 29 of Article II forbidding the passage of "any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court" did not become a part of the Constitution of North Carolina until it was adopted by the qualified voters of the State in the general election in 1916, the General Assembly of 1913 acted within constitutional limits in creating the Special Court of the Town of North Wilkesboro by private act. N. C. Const., Art. IV, Sections 2, 12. This being true, the record makes it plain that Mayor McNeil assumed the judgeship of a court established by law; that he actually occupied the judgeship and discharged its duties; and that he had at least a fair color of right or title to such judgeship under Chapter 144 of the Private Laws of 1913 and G.S. 128-7 by virtue of his election and qualification as Mayor. Hence, he was a judge *de facto* under common law principles when he tried the petitioner and sent her to jail. This conclusion is valid even if it be taken for granted that on its effective date, *i.e.,* 7 June, 1949, Chapter 1142 of the 1949 Session Laws caused Mayor McNeil's term as judge of the Special Court to expire, made the mayoralty and the judgeship incompatible offices, and rendered Mayor McNeil ineligible for the judgeship. Where the requisite conditions exist, a person is a judge *de facto* although he holds over after his term has expired, *Threadgill v. Railroad,* 73 N.C. 178; *Cary v. State,* 76 Ala. 78; *Territory v. Mattoon,* 21 Hawaii 672; *Feck v. Commonwealth,* 264 Ky. 556, 95 S.E. 2d 25; *Sheehan's Case,* 122 Mass. 445, 23 Am. Rep. 374; *Windom v. City of Duluth,* 137 Minn. 154, 162 N.W. 1075; *Carli v. Rhener,* 27 Minn. 296, 7 N.W. 139; *Youmans v. Hanna,* 35 N.D. 479, 161 N.W. 797, Ann. Cas. 1917 E, 263; *Cromer v. Boinest,* 27 S.C. 436, 3 S.E. 849; or although he holds incompatible offices, *Sheehan's Case, supra; Woodside v. Wagg,* 71 Me. 207; *Marta v. State* (Tex. Cr.), 193 S.W. 323; or although he is ineligible for the office, *In re Russell,* 60 N.C. 388; *In re Danford,* 157 Cal. 425, 108 Pac. 322; *Sheehan's Case, supra; Blackburn v. State,* 40 Tenn. 690.

The act of Mayor McNeil in trying the petitioner and committing her to jail was also immune to collateral attack under G.S. 128-6. He had been admitted and sworn into his dual office as Mayor and Judge by the proper authority, and should have been "held, deemed, and taken, by force of such admission," to have been rightfully in his office when he acted as judge in the petitioner's case.

The *de facto* doctrine is indispensable to the prompt and proper dispatch of governmental affairs. Endless confusion and expense would

ensue if the members of society were required to determine at their peril the rightful authority of each person occupying a public office before they invoked or yielded to his official action. An intolerable burden would be placed upon the incumbent of a public office if he were compelled to prove his title to his office to all those having occasion to deal with him in his official capacity. The administration of justice would be an impossible task if every litigant were privileged to question the lawful authority of a judge engaged in the full exercise of the functions of his judicial office.

The acts of Mayor McNeil were effectual in law; for he was at least a judge *de facto* when they were performed. This being so, it was error to permit the collateral attack upon his title to the judgeship, and to sustain such attack on the theory that he acted without authority. The judgment discharging the petitioner from custody is

Reversed.

LAWRENCE R. PHILLIPS v. ANDREW J. CHESSON AND MRS. ANDREW J. CHESSON.

(Filed 22 March, 1950.)

1. Waters and Watercourses § 4—

The lower land must receive the natural flow of surface water from adjoining higher land, but the owner or occupant of the higher land is liable for damages proximately resulting to the lower land from the diversion of the surface water or interference with its natural flow by artificial obstruction.

2. Same: Trespass § 6—

Where the diversion of surface water by a private owner results in continuing recurrent damages to the adjacent lower land of a private owner, and the cause of the damage is subject to removal by the voluntary action of the owner of the upper land or to abatement by court order, permanent damages may not be assessed except by consent of the parties.

3. Same—

In an action between private owners to recover for intermittent and recurrent damages resulting from defendant's wrongful diversion of surface waters, an instruction predicating the measure of damages upon the difference between the fair market value of the lower lands immediately before and immediately after the acts resulting in such wrongful diversion of the surface waters, is error, since in such action plaintiff is not entitled to recover permanent damages, but is entitled to recover only such damages as he has sustained up to the time of the institution of the action.

PHILLIPS *v.* CHESSON.

DEFENDANTS' appeal from *Pless, J.*, September-October 1949 Term, RUTHERFORD Superior Court.

For the statement we draw both from the pleadings and from the evidence on the trial, in so far as they are in accord.

The plaintiff and the defendants respectively own adjoining lots in the Town of Lake Lure, in the mountainous section of the State, on the borders of the lake of that name. The Chessons' lot is much higher than the Phillips lot—on a steep hillside, which declines sharply to the Phillips lot, on the lower level. On the mountain slope lot the Chessons had a home, and below this Phillips, on his property, had erected a "sleeping" cottage, and a "block" building consisting of kitchen, dining room, delicatessen and rest room, and the establishment was in use as an eating place for the public.

In improving their lot the defendants made an extensive excavation thereon, and in doing so, as plaintiff's evidence shows, dumped a substantial portion of the excavated clay on the upper part of plaintiff's lot.

Defendants also built a "slab" wall above their garden, to prevent the flow of water from the hillside from injuring or destroying it. The plaintiff says he complained to the defendants about the dirt from the excavation, 25 or more tons, being put on his land—and asked them to remove it, which they declined to do. Defendants contend that they removed most of the dirt and that the amount left was negligible.

The plaintiff complained, and the evidence on his part tended to show, that both the excavation and the wall referred to had the effect of diverting the water from its natural flow down the hillside from which he had adequately protected his buildings by deep and wide ditches, at great expense, and caused an overflow which greatly damaged his property; that the water broke through the mound of clay referred to above, as well as through the excavation defendants had made, spread a deep deposit of clay on his lot, reaching down to his buildings; that because of the overflow of water bearing mud and clay, the lower part of his building became flooded, and the expensive hardwood floor became soaked in mud, water and filth, and buckled, from absorbing water at the "lapped" joints of the floor boards, causing serious damage, replaceable to original condition only at great expense. Other damages to the premises were included in the complaint and evidence.

The complaint does not allege a permanent damage, but only a damage that will continue to recur as long as the condition described remains in its present condition.

The relief prayed for in the complaint is:

> "(a) That he have and recover of the defendants both jointly and severally the sum of $5,000.

"(b) That a mandatory injunction be issued requiring the defendants to correct the grave and serious damages to plaintiff as hereinbefore alleged;

"(c) For the costs of this action; and

"(d) For such other and further relief as to the Court may seem just and proper in the premises."

The plaintiff, on the issue of damages, was permitted over objection to introduce evidence as to the difference between the market value of the property immediately before the alleged injury and the market value thereof immediately afterwards.

Defendants objected to the instruction given the jury as follows:

"If the plaintiff is entitled to recover in the fourth issue he is entitled to recover the difference in the reasonable market value of his property flowing from and directly and immediately resulting from the wrongful diversion of water by the defendants, if you find there has been a wrongful diversion, and if you find there is a difference now in the reasonable market value of his property because of that wrongful diversion."

There are several other challenged instructions to a like effect to which objection was made.

At the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence the defendants demurred and moved for judgment of nonsuit, which was declined, and defendants excepted.

The evidence was submitted to the jury on the following issues and answered as noted:

"1. Did the defendants wrongfully place and leave dirt upon the lands of the plaintiff, as alleged in the complaint? Answer: Yes.

"2. If so, what damages is plaintiff entitled to recover on account of such dirt? Answer: $50.00.

"3. Did the defendants wrongfully divert water from their lands to those of the plaintiff, as alleged in the complaint? Answer: Yes.

"4. If so, what amount is the plaintiff entitled to recover? Answer: $300.00."

The defendants, having made their motion to set aside the verdict for errors committed on the trial, excepted to the ensuing judgment on the verdict and appealed.

Hamrick & Hamrick and Sidney L. Truesdale for plaintiff, appellee.

Jones & Davis for defendants, appellants.

SEAWELL, J. With respect to surface water, the duties of owners of adjoining lands respectively on a different level are reciprocal and complementary. The lower land is servient to that on a higher level in the sense that it must receive the natural flow of surface water from the higher land; and the servient owner must dispose of it as best he can without in turn becoming an offender.

Here we are concerned with the duties of the owners or occupants of the land on the higher level. Such owners or occupants cannot divert the surface water or interfere with its natural flow by artificial obstruction or device so as to injure the premises of the servient owner without incurring actionable liability. *Winchester v. Byers,* 196 N.C. 383, 145 S.E. 774; *Porter v. Durham,* 74 N.C. 767, 779; *Brown v. R. R.,* 165 N.C. 392, 395, 396, 81 S.E. 450.

The question whether more water or less water is caused to flow onto the lower land—which may be a factor bearing on liability—is often by no means the most important. The manner of its collection and release, the intermittent increase in volume and destructive force, its direction to a more vulnerable point of invasion, may often become important. *Porter v. Durham, supra.*

1. The evidence taken in the light most favorable to the plaintiff tends to show an infraction of legal duties on the part of the defendants in the diversion of surface waters on their own premises, resulting in damage to the servient owner and is legally sufficient to survive the demurrer.

2. The defendant challenges the validity of the trial on the ground that the court erred in the important matter of instructing the jury on the measure of damages. The objecion is that he instructed them without any qualification that the proper measure of the damages was the difference in the market value of the land immediately before the injury and immediately afterwards. This the appellant contends is not applicable to a case in which temporary damages alone are demanded and allowable.

On the record the plaintiff's suit must be regarded and treated as an action for the recovery of temporary damages, and only damages of that nature may be awarded.

In his complaint he describes the damage as "continuing" and "recurrent," and the evidence shows it to be typically of that character. (No distinction is made in the law between a continuing trespass which resolves into a nuisance, and other kinds of nuisance with respect to the legal consequences.)

The impermanent nature of the condition from which the intermittent or recurrent damage arises is recognized in the constitution of the case, since the plaintiff has concomitantly with his prayer for damages invoked injunctive relief for its abatement. The cause of the recurring damage,

then, is one which may be removed by the voluntary action of the defendant, or abated by court action, if that should be adjudged appropriate. Plaintiff's remedy in a proceeding of this sort, between private parties, is by successive suits brought from time to time against the author of the nuisance as long as the noxious condition is maintained, in which he may recover past damages down to the time of the trial; *Ridley v. R. R.*, 118 N.C. 996, 24 S.E. 730; not including subjects of prior adjudication. In this way it has been said, (*Ridley v. R. R., supra*), the defendant's willingness to abate or remove the cause of damage may be stimulated when repeatedly mulcted in damages by reason of its continued maintenance. *Winchester v. Byers,* 196 N.C. 383, 145 S.E. 774; *Eller v. Greensboro,* 190 N.C. 715, 720, 130 S.E. 851; *Morrow v. Mills,* 181 N.C. 423, 107 S.E. 445; *Webb v. Chemical Co.,* 170 N.C. 662, 87 S.E. 633; *Barcliff v. R. R.,* 168 N.C. 268, 84 S.E. 290; *Brown v. R. R., supra; Ridley v. R. R., supra; Adams v. R. R.,* 110 N.C. 325, 14 S.E. 857.

In contrast, permanent damages, as the term is used in the law, are given in one award of entire damages on the theory that all damage flows from the original injury, recognized as permanent in character; and such award includes compensation for all damage, however intermittent, or recurring, past, present and prospective, naturally flowing from and proximately caused by the original injury *Porter v. R. R.,* 148 N.C. 563, 62 S.E. 741; *Barclift v. R. R.,* 175 N.C. 114, 116, 95 S.E. 39; *McMahan v. R. R.,* 170 N.C. 456, 458, 87 S.E. 237. Following an award of that sort the defendant author of the injury has in effect acquired an easement to continue the offending condition without further liability. McCormick on Damages, p. 514.

When the action is between private persons, as it is here, the plaintiff in such a case cannot be required to thus consolidate all his demands in one action and ask for or receive permanent damages. Where private ownership is involved only by consent of parties may an issue of permanent damages be submitted. *Morrow v. Mills, supra; Webb v. Chemical Co., supra.*

A different rule as to the propriety or necessity of awarding permanent damages is applied where the defendant is a *quasi*-public utility, or agency having a right of eminent domain, or power of condemnation, when the subject property right falls within the purview of that power. In that case either the plaintiff or the defendant may demand that permanent damages instead of temporary damages be made the subject of inquiry, (*Mitchell v. Ahoskie,* 190 N.C. 235, 129 S.E. 626; *Eller v. Greensboro,* 190 N.C. 715, 720, 130 S.E. 851), with the consequence, as we have observed, that upon recovery of damages by plaintiff the defendant gets an easement, or at least the plaintiff is estopped from further action respecting the subject of the award.

3. From the foregoing the force of defendant's challenge to the diminution in market value as a rule to be applied to the measurement of damages in this case becomes clear.

The objective of any proceeding to rectify a wrongful injury resulting in loss is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money. 25 C.J.S., Damages, Sec. 3.

The courts, always moving toward rules of general application to frequently recurring situations, have evolved many rules which achieve the merit of convenient application and easy provability at the expense of a nearer approach to reality in the particular case. Amongst them is the rule, sometimes called ordinary, that the measure of damages recoverable for injury to property is the difference between the market value immediately before the injury and the market value immediately afterwards. This rule, which can be an approximation to truth in a limited number of cases, is often too remote from the factual pattern of the injury and its compensable items to reflect the fairness and justice which the administration of the law presupposes. For that reason it is applied with caution, and often with modifications designed to relax its rigidity and fit it to the facts of the particular case. Conceding the soundness and applicability of the diminution in value of the premises as the measure of permanent damages where all proximate damage arising from the original injury, past, present and prospective is considered, the application of the rule to a case where temporary damage only is involved has not generally met with approval.

The great weight of authority where the point has been squarely presented *sine nubibus* clearly rejects the diminution of market value as neither accurate, convenient nor just where, as here, temporary damages only will be allowed, where the cause of the injury is impermanent in the sense that it may be removed by the offender voluntarily or abated by equitable proceedings which the plaintiff has here invoked. "As a general rule the diminished market value of the property will not be used as a measure of damages for a temporary injury to real estate, but only when the injury to the realty is permanent." 15 Am. Jur., Damages, sec. 110; 25 C.J.S., Damages, sec. 84, p. 685; McCormick, Damages, loc. cit., *supra; Norwood v. Sheen,* 87 A.L.R. Anno., 1384, Div. III; *Williams v. State,* 175 N.Y.S. 560, 106 Misc. 19; *Noakes v. State,* 175 N.Y.S. 557, 104 Misc. 276; *Rider v. Town of Lexington, Mass.,* 21 N.E. 2d 382, 388; *Adams v. R. R., supra,* and cases cited. The court was in error in applying the rule as given in the instruction.

Various other rules are applied, such as diminished rental value, reasonable costs of replacement or repair, or restoring the property to its original condition with added damages for other incidental items of loss,

as to the application of which in the instant case it is not necessary for us now to inquire.

Cases where the injury is completed or by a single act becomes a *fait accompli* and which do not involve a continuing wrong or intermittent or recurring damage, (*Construction Co. v. R. R.*, 185 N.C. 43, 116 S.E. 3; *DeLaney v. Henderson-Gilmer Co.*, 192 N.C. 647, 651, 652, 135 S.E. 791; *Broadhurst v. Blythe Bros. Co.*, 220 N.C. 464, 17 S.E. 2d 646), make no challenge to the foregoing statement of the rule. We do not find it profitable to inquire whether the rule applied by the court was favorable to the defendant and, therefore, tended to cure the error. It would lead into dialectic discussion, and not to a ready answer.

For the error noted the defendant is entitled to a new trial. It is so ordered. *Venire de novo.*

Error. New trial.

M. E. CASSTEVENS v. FRANK CASSTEVENS, LULA CASSTEVENS AND HUGHIE CASSTEVENS.

(Filed 22 March, 1950.)

1. Appeal and Error § 6a—

Agreement to the submission of an issue by a party does not preclude an objection to its submission by such party when the agreement relates to the submission of the issue as the measure of accrued damage, and the issue is used as the basis for the adjudication of defendants' liability to plaintiff for monthly payments *in futuro*.

2. Deeds § 16c—

Where defendants have covenanted in their deed to support grantor for the remainder of her life and to provide her with all necessary medical and hospital expenses and to provide proper burial upon her death, liability of defendants *in futuro* cannot be adjudicated in a fixed monthly sum.

3. Pleadings § 22b—

While wide latitude is given the trial court to permit amendment to the pleading to conform to the evidence, even after verdict, the allowance of an amendment after verdict in substantial disagreement with the evidence must be held for error. G.S., 1-163.

DEFENDANTS' appeal from *Rousseau, J.*, November Term, 1949, YADKIN Superior Court.

This action was brought for relief under the following circumstances:

The plaintiff and her husband, after living together for a long while, during which time nine children were born to them, fell into domestic

discord, the exact nature of which is not revealed in the record, and decided to separate.

Between them they owned nearly 350 acres of land in several parcels, of which 41.5 acres containing the "home" place belonged to the wife individually. It may be assumed from the record, which is not clear on this point, that the remaining land was owned by the husband individually, and the wife had in it only a dower interest.

There was no written separation agreement; but pursuant to a parol understanding they joined in a deed dated December 6, 1938, in which they conveyed all of the aforesaid lands, together with household and kitchen furniture, livestock, farm utensils and equipment, and other personalty, for the nominal sum of $100, upon the following conditions:

> "This deed is made on the special condition that the said Frank Casstevens, Hughie Casstevens, Jemima Casstevens and Lula Casstevens provide an adequate and comfortable living for said M. E. Casstevens during her lifetime according to her station in life and in the manner and form that she has always lived, and to provide for her all necessary medical attention, pay doctor's bills and any necessary hospitalization, and provide for her a suitable burial."

Casstevens, the husband, reserved "for his own individual use and ownership, one bed and bed clothing, one iron money safe, one one-horse plow, one hammer, one saw, 10 bushels of wheat and 25 bushels of corn."

The conveyance is by deed poll. There is no language in it qualifying the terms of the quoted condition or further bearing on the intent, or providing that the required support shall come out of the land or be a charge thereupon. There is a further condition, pertinent only by contrast, requiring the payment to Gilmer Casstevens of $800 within five years from the date of the deed, and providing that in case it is not paid in that time he "shall have a lien on said lands" until the amount "is fully paid."

J. W. Casstevens took the few items of personalty and went elsewhere to live. In due time he obtained a divorce, and, if living, is not a party to this action.

Jemima died in 1943 and her undivided interest in the land was sold under order of the court, Frank Casstevens becoming the purchaser.

After executing the deed the plaintiff "stayed on" at the home place until the year 1947.

Meantime, in 1944, by consent of plaintiff the lands had been divided and portions allotted to the living grantees respectively. Hughie's part was allotted on another part of the land, on which he went to live.

Frank Casstevens was away several years, part of the time with the father, coming back to the home place in 1945. During the time he was away Hughie Casstevens and Lula Casstevens, and Jemima, until her death, lived on the place and cared for the plaintiff. After Frank's return plaintiff lived with him until July, 1947, when trouble developing between the boys, she went to live with Hughie, where she resided at the institution and trial of this action.

On the hearing the plaintiff testified that Frank not only failed to provide for her as he was required to do by the deed, but that he made her very uncomfortable, refused to supply her with snuff, bought her no clothing, provided for her no medical attention, which she badly needed because of her age and rheumatic condition, and that Frank and Lula constantly made her life uncomfortable by "jawing" at her and other mistreatment; and that it was for this reason that she left the home and went to live with Hughie. She further testified that she was the victim of an assault by Frank with a tobacco stick while lying sick in bed. In the latter she was corroborated by the testimony of Hughie's wife, Lela, who said she witnessed the assault.

All this Frank denied, stating that he gave her every required attention, obtained credit for her at a nearby grocery store for anything she wanted; at numerous times after she went to live with Hughie, he begged her to return to the home, both personally and by messenger, which she would not do; that he had at various times sent her checks while she was at Hughie's, as well as snuff, "provisions," shoes and clothing; and testified that he was still ready, able and willing to do all required of him under the deed.

The plaintiff testified that she did receive some checks totaling a small amount from Statesville, which she used for medical expenses; received one pair of shoes which she never wore; that she received no snuff from Frank to her knowledge, and that she had been advised by her doctor not to return to the home place and live with Frank because of her age and diseases, since the incidents of living there might cause her to die. She further testified substantially that since she had been living with Hughie her needs had been adequately met, but that she could use more.

The cause was tried on the theory that the defendants were liable for a breach of contract for nonperformance of the condition in the deed requiring her support in the specified manner.

The following issues were submited to the jury and answered as indicated:

> 1. "Have the defendants failed and neglected to comply with the conditions as to the support and maintenance of the plaintiff as set forth in the deed of December 6, 1938, as alleged in the complaint? Answer: Yes.

"2. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $1,000.00.

"3. What is a reasonable monthly allowance for the support and maintenance of Mrs. M. E. Casstevens? Answer: $150.00."

Relating to the subject matter of the third issue, it appears in the record in pertinent findings of fact that the trial judge, after defendants' counsel had completed argument to the jury and plaintiff's counsel was nearing conclusion of the final address, notified defendants' counsel that he would allow plaintiff's counsel to amend her complaint so as to ask for $150 monthly allowance; (the complaint asked for $100). The record further shows:

"The Court in its discretion, after the jury had returned its verdict upon all of the issues, as appears in the record, again allows plaintiff's counsel to amend her complaint to comply with the answer to the third issue."

Defendants' counsel objected to the amendment, and was overruled. He then asked for time to answer the amendment and prepare a defense, which was declined, and he excepted.

Numerous exceptions made to the admission of evidence are omitted as not pertinent to the decision.

On the coming in of the verdict defendants moved to set it aside for errors of law committed on the trial. The motion was declined and defendants excepted. To the ensuing judgment on the verdict defendants objected, excepted and therefrom appealed.

A. T. Grant and F. D. B. Harding for plaintiff, appellee.

Hall & Zachary for defendants, appellants.

SEAWELL, J. The theory on which this case was tried and the history of its progress through the lower court challenges the ingenuity of the reviewing board in dealing with it, without, *ex mero motu,* raising questions of error or posing hurdles which litigants on both sides took in stride, or regarded as nonexistent. Some of the questions which might engage the attention of counsel and of the court on retrial may be: The nature of the estate conveyed by the deed as affected by the condition subsequent attached to it; the remedy which may be demanded by the plaintiff in case of nonperformance, either as co-grantor, or as beneficiary of the condition,—whether as upon covenant or for rescission; and whether, under the facts of the case as they may then develop and

applicable law, it would be competent for the trial court to make any sum recovered a lien upon the land.

A study of these problems, if it does not lead the parties to compose their differences, (rather than risk much and gain little), will at least give the courts an intelligent opportunity to do justice under law.

The case was tried in the lower court upon the theory that the plaintiff was entitled to recover, if at all, for the breach of contract for support made a condition in the deed, and that the damages might be assessed and recovered upon that principle; and that those damages might be fixed as a definite monthly sum to measure past breach, and future liability; and under the issues in the case the judgment was framed with reference to this fixed and invariable sum which, in the estimate of the testifying witnesses, might represent the obligation of the defendants throughout the period considered, past, present and future; and the award given by the jury on that principle both for past damage and prospective satisfaction of the terms of the contract was made a lien upon the land.

This Court is not in accord with all the principles applied, or with the theory of the case in general, but an attempt to chart the case on retrial in detail would make the Court a mere advisory board, and is not consonant with our practice.

Counsel for the appellee argues that the defendants put themselves out of court by suggesting and agreeing to the submission of the third issue, which appellee contends bears the gravamen of damages. That might be true except for the fact that the issue with its answer must have judicial interpretation to apply to the facts of the case; and appellants contend that the interpretation was erroneous since the court made it to apply as a measure of future obligations of the defendants; and cover this with an exception.

Upon the facts of this case the objection was properly made and must be sustained. As applied the inflexible measure rests upon a highly speculative basis and is unfair to both litigants, but more so to the defendants, and the defendants did not waive any right to object to it. To define the needs of the plaintiff either in comfortable support, or especially in medical attention for her during her remaining declining years would require a prescience that cannot be attributed to any witness, even if it could be included in a suit based upon breach of contract for nonperformance of the condition; and we repeat that we do not pass upon the propriety of that remedy.

However, respecting this third issue and the subject that it covers, the defendants objected to an amendment made by the court after verdict. For the circumstances attending it we refer to the above statement from the record.

The pertinent statute, G.S. 1-163, is very liberal in allowing amendments, even after the verdict by the jury, "by conforming the pleading or proceeding to the fact proved." The amendment here is in substantial disagreement with the evidence as to the very subject of the inquiry, and the circumstances under which it was allowed do not bring it within the purview of the statute. Its allowance, therefore, must be held for error. It is not necessary to advert to other exceptions.

For the errors noted the defendants are entitled to a new trial. It is so ordered. *Venire de novo.*

Error. New trial.

TOWN OF BURNSVILLE v. W. K. BOONE AND WIFE, MARY T. BOONE.

(Filed 22 March, 1950.)

1. Trial § 55—

Where the parties waive a jury trial and agree that the court find the facts, the court's findings have the force and effect of a verdict of the jury upon the issues involved. G.S.. 1-184, Constitution of N. C., Art. IV, Sec. 13.

2. Appeal and Error § 40d—

The findings of fact of the trial court are conclusive on appeal if there be evidence to support them.

3. Appeal and Error § 6c (3)—

Exceptions to the findings of fact by the court and to each and every fact found is a broadside exception and does not bring up for review the findings of the trial court or the sufficiency of the evidence to support the findings, it being required that the exceptions and assignments of error particularly and specifically point out the alleged errors.

4. Appeal and Error § 6c (2)—

An exception to the signing of the judgment is insufficient to bring up for review the findings of fact, or the competency and sufficiency of the evidence to support the findings and conclusions of the trial judge.

5. Appeal and Error § 6c (3)—

In the absence of proper exceptions to the findings of fact, exceptions to the admission of evidence and exceptions to the denial of appellant's motions for judgment as of nonsuit are ineffectual.

6. Appeal and Error § 40a—

An exception to the signing of the judgment will not be sustained when the facts found by the trial court support the judgment.

APPEAL by defendants from *Pless, J.,* at Regular October Term, 1949, of YANCEY.

Civil action to foreclose lien of taxes levied by plaintiff against property of defendants for the years 1937 to 1947, both inclusive, brought under and pursuant to the provisions of G.S. 105-414, formerly C.S. 7990, "and related statutes."

Defendants, answering the complaint of plaintiff filed in the action, admit the ownership of the land in question, but deny all other allegations of the complaint, including those as to the corporate existence of plaintiff and as to its authority to levy and collect taxes. And for further defense defendants aver (1) that the taxes sought to be collected exceed the limitations fixed by law,—particularly in G.S. 160-402, and (2) that the taxes for the years 1937 and 1938 are barred by the ten years' statute of limitations, G.S. 105-422, as amended by 1947 Session Laws, Chap. 1065, and they plead it in bar of this action.

The parties waived jury trial and agreed for the judge to hear the evidence and to find the facts and to render judgment on the facts found.

Pursuant thereto plaintiff offered evidence, without objection by defendants, tending to show that a certain described territory was created into the Town of Burnsville, North Carolina, by the Municipal Board of Control by virtue of authority given under Sections 2779 to 2782 of Consolidated Statutes of 1919 (now G.S. 160-195 to G.S. 160-198). And the parties stipulated that "defendants property described in the complaint is located within the bounds of said territory."

Plaintiff also offered in the course of the hearing before the judge evidence, both oral and documentary, tending to support the other allegations of the complaint. To parts of the oral, as well as to parts of the documentary evidence, defendants objected and excepted.

The judge after hearing the evidence and argument of counsel found certain facts in respect of the matters in issue as shown by the pleadings, including the fact of the corporate existence of the Town of Burnsville, North Carolina, with the power to levy taxes. And the court, upon the facts so found, rendered judgment in favor of the plaintiff and against the defendants for the aggregate amount of taxes found to be due and "for such other sum as may be represented by taxes levied and unpaid during the pendency of the action," and for the cost of the action to be taxed, and ordered a sale of the land described in the complaint, and appointed a commissioner to sell same, etc. The facts found are incorporated in the judgment so rendered.

And the record shows that "to the findings of fact in the foregoing judgment and to the findings of each and every fact, the defendants object and except (Exception No. 39), and to the conclusions of law the defendants object and except (Exception No. 40), and to the rendition and signing of said judgment the defendants object and except (Excep-

tion No. 41),—all the aforesaid objections and exceptions being made in apt time and in open court."

Defendants appeal to Supreme Court and assign error.

Bill Atkins for plaintiff, appellee.

C. P. Randolph and W. E. Anglin for defendants, appellants.

WINBORNE, J. The parties to a civil action may waive trial by jury, and agree that the presiding judge may find the facts in respect to the issues of fact raised by the pleadings, and declare his conclusions of law arising thereon. G.S. 1-184. His findings upon the facts have the force and effect of a verdict by a jury upon the issues involved. Constitution of N. C., Art. IV, Sec. 13. And his findings of fact are conclusive on appeal if there be evidence to support them. *Chastain v. Coward,* 79 N.C. 543; *Branton v. O'Briant,* 93 N.C. 99; *Roberts v. Ins. Co.,* 118 N.C. 429, 24 S.E. 780; *Matthews v. Fry,* 143 N.C. 384, 55 S.E. 787; *Buchanan v. Clark,* 164 N.C. 56, 80 S.E. 424; *Eley v. R. R.,* 165 N.C. 78, 80 S.E. 1064; *Trust Co. v. Cooke,* 204 N.C. 566, 169 S.E. 148; *Assurance Society v. Lazarus,* 207 N.C. 63, 175 S.E. 705; *Odom v. Palmer,* 209 N.C. 93, 182 S.E. 741; *Best v. Garris,* 211 N.C. 305, 190 S.E. 221; *Trust Co. v. Lumber Co.,* 221 N.C. 89, 19 S.E. 2d 138; *Turlington v. Neighbors,* 222 N.C. 694, 24 S.E. 2d 648; *Fish v. Hanson,* 223 N.C. 143, 25 S.E. 2d 461; *Swink v. Horn,* 226 N.C. 713, 40 S.E. 2d 353; *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464; *Griggs v. York-Shipley,* 229 N.C. 572, 50 S.E. 2d 914; *Cannon v. Blair,* 229 N.C. 606, 50 S.E. 2d 732.

When it is claimed that findings of fact, so made by the trial judge, are not supported by the evidence, the exceptions and assignments of error in relation thereto must specifically and distinctly point out the alleged errors. *Suit v. Suit,* 78 N.C. 272; *Chastain v. Coward, supra; Cooper v. Middleton,* 94 N.C. 86; *Battle v. Mayo,* 102 N.C. 413, 9 S.E. 384; *Mfg. Co. v. Brooks,* 106 N.C. 107, 11 S.E. 456; *Tilley v. Bivens,* 110 N.C. 343, 14 S.E. 920; *Sturdevant v. Cotton Mills,* 171 N.C. 119, 87 S.E. 992; *Boyer v. Jarrell,* 180 N.C. 479, 105 S.E. 9; *Hickory v. Catawba County,* 206 N.C. 165, 173 S.E. 56; *Vestal v. Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427; *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602; *Wilson v. Robinson,* 224 N.C. 851, 32 S.E. 2d 601; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609.

In *Hickory v. Catawba County, supra,* there was a general exception to the judgment and to the judge's findings of fact. Speaking as to the latter, this Court said: "The exception is too indefinite to bring up for review the findings of the trial court," citing the *Sturdevant* and *Boyer cases, supra.*

In *Vestal v. Machine Co., supra,* the exception is "to the rulings of the court and findings of fact upon which the judgment was signed," and the assignment of error is "that the court erred in its rulings and findings of fact." The opinion of this Court says that "this is a broadside exception and assignment of error,"—that "it fails to point out or designate the particular finding of fact to which exception is taken; nor is it sufficient to challenge the sufficiency of the evidence to support the findings, or any one or more of them," citing cases.

In *Wilson v. Robinson, supra,* this headnote epitomizes the opinion: "A general exception, to the court's findings of fact and to the signing of the judgment thereon, is insufficient to bring up for review the findings of the judge. The alleged errors should be pointed out by specific exceptions to the findings of fact as well as law."

And in *McDaniel v. Leggett, supra,* it is said that "while the defendants excepted generally to the clerk's findings of fact, no objection made to any specific finding was noted. This was insufficient," citing cases.

In the light of these principles we are constrained to hold that the exceptions, Nos. 39, 40 and 41, entered when the judgment was rendered, as set forth in the statement of facts hereinabove, and the assignments of error that "His Honor erred" (1) "in finding the facts set forth in the judgment and to each and every one thereof," (2) "as to the conclusions of law in the judgment of the court," and (3) "in the rendition and signing of the judgment," as shown in the record on this appeal, are too general and indefinite to challenge the sufficiency of, and to bring up for review the evidence as to any particular finding of fact made by the trial judge. They amount to no more than an exception to the judgment and to the signing of it.

In the absence of proper exceptions to the findings of fact, an exception to the signing of a judgment is insufficient to bring up for review the findings of fact, or the competency and sufficiency of the evidence to support the findings and conclusions of the trial judge. *Fox v. Mills,* 225 N.C. 580, 35 S.E. 2d 869.

Moreover, in the absence of such proper exception to the findings of fact, of which defendants complain, exceptions to the admission of evidence, taken during the course of the hearing before the trial judge, as well as the exceptions taken by defendants to the rulings of the judge in denying their motions for judgment as of nonsuit, and assigned as error, are ineffectual. *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51; *Mfg. Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577.

Hence, applying these principles to the case in hand, there remains for consideration only the exception to the judgment and to the signing of it.

And since the facts as found by the trial judge support the judgment, it must be, and it is hereby

Affirmed.

J. M. NICHOLS, ADMINISTRATOR OF THE ESTATE OF ALLEN NICHOLS, DECEASED, v. J. M. GOLDSTON, TRADING AND DOING BUSINESS AS GOLDSTON MOTOR EXPRESS,

and

OLA P. HIX, ADMINISTRATRIX OF THE ESTATE OF DAVIS JEFFERSON HIX, v. J. M. GOLDSTON, TRADING AND DOING BUSINESS AS GOLDSTON MOTOR EXPRESS.

(Filed 22 March, 1950.)

1. Venue § 4b—

While in the exercise of its discretionary power to remove a cause for the convenience of witnesses and to promote the ends of justice, the trial judge has no authority to impose upon movant an obligation for which he is not legally liable, the court may incorporate in the order of removal, with movant's consent, provision that movant pay the reasonable costs of transporting the witnesses of the adverse party when the court is of opinion that removal, even though required for the convenience of witnesses, would not promote the ends of justice unless movant should pay such expense. G.S. 1-83 (2).

2. Costs § 5—

A provision in an order for removal that movant should pay "costs" of transporting the witnesses of the adverse party, *held* to mean "expense," since such "costs" are no part of the costs of the action. G.S. 6-1.

3. Judgment § 3½—

Where agreement of defendant movant to pay the costs of transporting the adverse party's witnesses is incorporated in an order removing the cause to another county for the convenience of witnesses, plaintiff may recover upon the contract in an independent action, since such agreement is an independent obligation between the parties, or at least between the defendant and the court for the benefit of plaintiff, upon which he is entitled to sue.

APPEAL by defendant from *Rudisill, J.,* at January Term, 1950, of WILKES.

Two civil actions for recovery of transportation costs on alleged contracts pursuant to order of court in former actions between the same parties,—heard upon demurrers to complaints of plaintiffs,—consolidated for purposes of this appeal.

The complaints in the two actions are identical, except as to names and amounts, and the demurrers are identical. So, for brevity, reference will be made only to complaint in the *Nichols case.*

In this, the *Nichols case,* plaintiffs allege substantially these pertinent facts:

(1) That in year 1945 plaintiff, a resident of Wilkes County, North Carolina, and duly qualified administrator of Allen Nichols, deceased, instituted an action in Superior Court of said County, to recover of defendants damages for alleged wrongful death of Allen Nichols in said year as result of a truck wreck in Rockingham County, North Carolina; and in apt time defendant came into court and filed a motion for the removal of the action from Wilkes County to Rockingham County, North Carolina, for trial;

(2) That when the motion came on for hearing, and was heard, the judge of Superior Court signed an order that the action be removed to Rockingham County for trial, "provided the defendant would enter into a contract by the terms of which he would pay the costs of the transportation for the plaintiff's witnesses in Wilkes County, including the plaintiff, to and from Wentworth, N. C., for the purpose of their appearance at the time of the trial of the case, said stipulation and provision being set out in said order signed by a judge of the Superior Court, a copy of which order" is attached to and made a part of the complaint. The copy of the order reads:

"This cause coming on to be heard and being heard upon defendant's motion to move the cause from Wilkes County to Guilford County or to Rockingham County for the purpose of trial, for the convenience of witnesses and promotion of justice, and the Court being of the opinion that the convenience of witnesses and promotion of justice reasonably require the cause to be moved:

"IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED, that in the Court's discretion, the cause be and is hereby removed from Wilkes County to Rockingham County for the purpose of trial.

"IT IS FURTHER ORDERED that the defendant pay such reasonable costs for transportation of the plaintiff's witnesses in Wilkes County, including the plaintiff, to and from Wentworth, N. C., for the purpose of their appearance at the time of the trial.

"This provision was agreed to by the defendant at the time of the hearing of the motion. It was made to appear to the Court that the plaintiff would be greatly handicapped in procuring transportation for witnesses to points other than Wilkesboro. The Court, thereupon, suggested to the defendant as a condition of the removal that the defendant pay the cost of the transportaion of the witnesses, which proposal the defendant agreed to."

And plaintiff further alleged:

"3. That the defendant, through his employes and agent and attorney of record, entered into said agreement and by the terms of same agreed

to pay for the transportation of the plaintiff's witnesses from Wilkes County to Rockingham County for their appearance at the time of the trial, and that said order recites that the defendant agreed to do this, and relying on this agreement the Judge then signed the order for removal.

"4. That under the terms of the agreement the defendant was to pay for the transportation of the plaintiff's witnesses and for the transportation of the plaintiff himself, to and from Wilkes County, N. C., to Rockingham County, N. C., for their appearance at the time of the trial.

"5. That the cases were tried in Rockingham County and subsequent to the trial the plaintiff has furnished to the defendant, or his employee and attorney of record, verified statements of the amount of the expenses of transportation for himself and his witnesses, which amounts to the aggregate total of $565.64 and that the defendant has failed and refused to pay said amount under his agreement and contract, and now fails and refuses to pay the said amount.

"6. That under the terms of the contract the defendant is justly indebted to this plaintiff in the sum of $565.64 etc."

Defendant demurred to the complaint "on the grounds that the complaint does not state a cause of action against the defendant,—it appearing upon the face of the complaint that the remedy, if any, of the plaintiff for and on account of the matters and things mentioned in the complaint is by motion in the cause in the suit which was instituted in the Superior Court of Wilkes County to recover for the alleged wrongful death of the plaintiff's intestate, which suit was later removed to the Superior Court of Rockingham for trial."

The demurrer was heard in due course of procedure and was overruled. Defendant objected and excepted, and appeals to Supreme Court, assigning error.

Trivette, Holshouser & Mitchell and Hayes & Hayes for plaintiffs, appellees.

Welch Jordan for defendant, appellant.

WINBORNE, J. The defendant, appellant, challenges here the correctness of the judgment overruling his demurrer, solely upon the ground that on the facts alleged in the complaint, accepted as true for purpose of considering the demurrer, plaintiff's remedy is by motion in the cause in the former action, and not by this independent action.

No direct authority is cited by the defendant to sustain his position. The authorities cited are distinguishable in factual situations. But in the light of the authority of the judge, and of the relative legal rights of the parties, at the time and under the circumstances alleged, in respect to the provisions of the order of removal, we are of opinion that an

independent contract was created between the parties, or at least between the defendant and the court for the benefit of plaintiff, on which plaintiff may maintain an independent action.

The court was called upon to pass on defendant's motion for the removal of the action from the Superior Court of Wilkes County, a proper venue, to, and for trial in the Superior Court of Rockingham County or of Guilford County, for the convenience of witnesses, and that the ends of justice be promoted. G.S. 1-83 (2). Such a motion is addressed to the legal discretion of the trial judge. See *Belding v. Archer,* 131 N.C. 287, 42 S.E. 800; *Eames v. Armstrong,* 136 N.C. 392, 48 S.E. 769; *Oettinger v. Stock Co.,* 170 N.C. 152, 86 S.E. 957; *Craven v. Munger,* 170 N.C. 424, 87 S.E. 216; *Causey v. Morris,* 195 N.C. 532, 142 S.E. 783; *Power Co. v. Klutz,* 196 N.C. 358, 145 S.E. 681. But in the exercise of such discretion the trial judge was without authority to impose upon a party to the action, in the absence of his consent thereto, an obligation for which he was not then legally liable. In other words, the function of the judge was to determine, in his discretion, whether the convenience of witnesses and the promotion of justice required the removal of the action to some other county. And the order, made part of the complaint, clearly indicates that while the judge was of opinion that the convenience of witnesses required the removal of the action to Rockingham County, it is equally clear that the judge was of opinion that even so the ends of justice would not be promoted thereby, unless the defendant should pay the reasonable cost of transporting plaintiff and his witnesses to and from Rockingham County for the purpose of their appearance at the time of the trial of the action.

Patently the word "cost," appearing in the order, was used in the sense of "expense" of providing transportation for plaintiff and his witnesses to and from the place of trial of the action. Such cost of transportation was and is not "costs" incident to the action, for which defendant would become liable in the event the judgment was against him. Costs incident to the action, or costs of the action are "entirely creatures of legislation and constitute an incident of the judgment,"—and the liability for such costs depends upon the nature of the final judgment, and the party cast in the suit is the one upon whom the costs must fall. G.S. 6-1. *Ritchie v. Ritchie,* 192 N.C. 538, 135 S.E. 458, and cases cited. And there was and is no statute in this State pertaining to the cost of transporting a party and his witnesses as "costs" in the sense of costs of the action for which the losing party may be liable.

So, when the defendant acceded to the suggestion of the judge, that as a condition for the removal he, the defendant, agree to pay the cost of transporting plaintiff and his witnesses, defendant assumed an independent obligation to plaintiff, or for his benefit. And if only for his

benefit, still he may sue on it. *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383, and cases cited.

For reasons here stated both judgments from which appeal is taken are Affirmed.

CLYDE COMBS, MRS. BOYD COMBS BOSTON, MRS. MONTGOMERY COMBS DAVIS AND THOMAS COMBS v. WILL PORTER AND WIFE, MRS. WILL PORTER, MRS. MARY COMBS HALL AND HUSBAND, EUGENE HALL.

(Filed 22 March, 1950.)

1. Trial § 39—

A verdict will be sustained when, considered in the light of the pleadings, evidence and charge of the court, it is determinative of all material questions presented in the action.

2. Mortgages §§ 27, 39e (5)—

While the burden is on the parties attacking foreclosure to prove payment prior to foreclosure and to overcome the presumption of the truth of the recitals in the trustees' deed, the verdict of the jury in plaintiffs' favor upon their evidence, *is held* to support the judgment in plaintiffs' favor.

3. Mortgages § 30b—

While the executor of a deceased mortgagee may exercise the power of sale in the mortgage, G.S. 45-4, where there are two executors of the deceased mortgagee the power must be exercised by them jointly.

4. Appeal and Error § 39b—

Where the answer of the jury upon one of the issues is determinative of the rights of the parties, error in the charge of the court or in the admission of evidence relative to the other issues is harmless.

5. Appeal and Error § 39c—

The admission of testimony of one of plaintiffs that he was in the army and overseas for a period of time, offered in anticipation of the defense of the statute of limitations, *held* not prejudicial error, even though such defense was not interposed.

APPEAL by defendants from *Rudisill, J.,* January Term, 1950, of WILKES. No error.

Suit to recover a tract of 75 acres of land and to remove cloud.

Plaintiffs allege title as heirs of C. C. Combs, a common source of title, and that defendants claim under a purported foreclosure sale and deed by the executors of the mortgagee to whom C. C. Combs had given a mortgage, whereas plaintiffs aver the mortgage had been paid and no

foreclosure sale was ever had or deed executed or delivered by the executors, and that any deed purporting to have been executed by them was fraudulent and void.

Defendants allege that C. C. Combs and wife executed a mortgage on the land described to Elijah Sparks in 1927 to secure the sum of $200; that Elijah Sparks, the mortgagee having died, his executors, W. M. Sparks and A. E. Sparks, advertised and sold the land under the mortgage 24 March, 1930, and on 11 April, 1930, executed deed to the purchaser, I. A. Combs; that I. A. Combs died in 1930, leaving surviving his widow Mary Combs (now Mary Combs Hall), and a daughter, Maudie, who conveyed her interest in the land to her mother Mary Combs Hall; that Mary Combs Hall conveyed a portion of the land to one McKinley Wood, who in turn conveyed to defendant Will Porter. Defendants allege the mortgage and the deed to I. A. Combs were executed in good faith, and were duly registered. They claim title thereunder.

On the trial plaintiffs presented as a witness W. M. Sparks, one of the executors of Elijah Sparks, who testified that after the death of Elijah Sparks, C. C. Combs paid the mortgage in full to the executors and the mortgage was delivered to C. C. Combs; that witness did not advertise the land for sale and never heard of a sale; that no advertisement appeared in the Wilkes paper or he as a subscriber would have seen it; that he never heard of a deed being made; that he did not sell any land and did not sign any deed. Plaintiffs also offered evidence tending to show that C. C. Combs died in 1928, his wife having predeceased him, and that the plaintiffs, who were at that time children aged 4 and 10 years, were scattered; that I. A. Combs qualified as administrator of the estate of C. C. Combs and took charge of the land, and was also appointed guardian. That at that time the land was worth $2,500 to $3,000. Thomas Combs, the youngest of the plaintiffs, testified he was 25 years of age at time of the trial; that he entered the armed service in September, 1944, and served approximately 2 years, including 14 months overseas. Plaintiffs were not informed of the facts disclosed by W. M. Sparks until shortly before this suit was instituted 28 February, 1949. None of plaintiffs ever received anything from the land.

Defendants offered in evidence the will of Elijah Sparks showing appointment of W. M. Sparks and A. E. Sparks as executors; the record of the mortgage of C. C. Combs to Elijah Sparks; record of deed by executors of Elijah Sparks to I. A. Combs, dated 11 April, 1930, reciting sale under mortgage and purchase by I. A. Combs for $265. Defendant Will Porter testified the land was advertised for sale and sold by either W. M. or A. E. Sparks, and that I. A. Combs bid it off; that Mary Combs Hall "has been making her home there ever since they purchased it. . . .

I am occupying a little over half of it and the balance is being occupied by Mrs. Mary Combs Hall."

Issues were submitted to the jury and answered as follows:

"1. Did the grantor, W. M. Sparks, execute and deliver the deed to the C. C. Combs 75-acre tract of land, which is recorded in Book 154, at page 461? Answer: No.

"2. Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint? Answer: Yes.

"3. Did I. A. Combs take legal title to the property described in the complaint as Trustee for the plaintiffs? Answer: ....."

W. H. McElwee, Jr., for plaintiffs, appellees.

Trivette, Holshouser & Mitchell and J. F. Jordan for defendants.

DEVIN, J. Plaintiffs' allegation of title was supported by the stipulation that C. C. Combs was, at the time of his death, the owner of the land in controversy, and by the further fact that plaintiffs are the only heirs at law of C. C. Combs, the ancestor last seized. On the other hand, the defendants staked their case entirely on the Sparks mortgage plus evidence of a foreclosure sale thereunder, and the recorded deed purporting to have been executed in 1930 by the executors of the mortgagee wherein was recited forfeiture for nonpayment, due advertisement, and purchase by I. A. Combs under whom they claim. There was no plea of the statute of limitations or laches, nor allegation of adverse possession under color, nor that either of defendants was an innocent purchaser for value. The plaintiffs replied that the mortgage had been paid in the lifetime of C. C. Combs, that no foreclosure sale was ever advertised or held, nor had any deed pursuant thereto been executed by the executors of the mortgagee, and that the purported deed was fraudulent and void.

Upon these allegations and the conflicting evidence thereunder, as to payment of the mortgage, foreclosure sale and execution of the deed, the case was fought out, resulting in verdict and judgment for the plaintiffs.

While the first issue was apparently addressed only to the question of the execution and delivery of the deed by one of the executors of the mortgagee, in the light of the pleadings, evidence and charge of the court thereon, we think all the material questions litigated were presented to the jury under this issue and were answered in favor of the plaintiffs. There was no objection or exception to the form of this or any other issue submitted. *Donnell v. Greensboro,* 164 N.C. 330, 80 S.E. 377; *Stadiem v. Harvell,* 208 N.C. 103, 179 S.E. 448.

The burden of proof was on the plaintiffs to show that the mortgage had been paid off and discharged before the purported sale (*Mfg. Co. v.*

Jefferson, 216 N.C. 230, 4 S.E. 2d 434). Likewise, the recitals in the deed of the mortgagee's executors were *prima facie* evidence of the facts therein set forth (*Dillingham v. Gardner,* 219 N.C. 227, 13 S.E. 2d 478), and the burden of proof was on the plaintiffs to show otherwise, but the verdict seems to have sustained the plaintiffs' attack upon the purported deed. Moreover, while the statute (G.S. 45-4), authorizes the executor of a deceased mortgagee to exercise the power of foreclosure, it has been repeatedly held by this Court that when a power of sale is conferred upon two executors the power must be executed by them jointly, and that both must join in the sale and execution of the deed. *Wasson v. King,* 19 N.C. 262; *Swann v. Myers,* 75 N.C. 585; *Trogden v. Williams,* 144 N.C. 192 (204), 56 S.E. 865.

The court properly placed the burden of proof on all the questions embraced in the first issue on the plaintiffs, and his instructions to the jury and statement of the evidence and contentions of the parties thereon seem to have been free from prejudicial error.

The court further instructed the jury if they answered the first issue in favor of plaintiffs, that is no, they need not answer the second issue, but also added, "if you should answer the first issue no, then you would go to the second issue." Whatever may have been the purpose of the court in this instruction, it appears that the jury having answered the first issue no, that is, in effect sustaining the contention of the plaintiffs that no foreclosure had been had or deed executed, proceeded to answer the second issue yes, thereby finding plaintiffs were entitled to the land. The defendants' exception to the charge on the second issue is well taken, as no rules for the guidance of the jury were laid down or the law applicable to the establishment of title to real property explained. *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484; G.S. 1-180. This would ordinarily require a new trial, but for the fact that under the pleadings, stipulations, evidence, and charge of the court the verdict on the first issue was sufficient to establish the plaintiffs' title and right to possession of the land. *Donnell v. Greensboro, supra; Stadiem v. Harvell, supra.* The undenied fact that plaintiffs are the heirs of C. C. Combs, and the admission that he was the owner in fee simple of the land, nothing else appearing, would be sufficient to make out plaintiffs' title, and by the verdict on the first issue defendants' claim of superior title by virtue of a purported foreclosure sale and deed was determined adversely to the defendants. Plaintiffs in that state of the case would have been entitled to judgment on the admissions and verdict, and any error in failing to charge more fully on the second issue would be harmless error. *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863; *S. v. King,* 225 N.C. 236, 34 S.E. 2d 3.

The defendants noted numerous exceptions to the charge on the third issue, but that issue, which was submitted without objection or exception, was not answered by the jury, and the question of declaring defendants trustees of the title for the benefit of plaintiffs in the event plaintiffs failed on the first issue was eliminated from the case. Of this defendants cannot complain. For the same reason defendants' exception to evidence offered by plaintiffs pertinent to the third issue may not be held sufficient to require another trial.

Defendants assign error that one of plaintiffs was permitted to testify that while he was in the army he was overseas a portion of the time. This was apparently offered in anticipation of a possible defense which, however, was not interposed. It is not clear that objection was made to this evidence, but, in any event, we do not perceive any prejudicial error in this respect.

After consideration of the entire record in the light of defendants' exceptions, we reach the conclusion that no harmful error of which defendants can justly complain has been shown, and that the result should not be disturbed.

No error.

STATE v. OTIS CHASE.

(Filed 22 March, 1950.)

1. Robbery § 3—

An instruction to the effect that defendant might be convicted of common law robbery even though the taking was without felonious intent, must be held for prejudicial error.

2. Criminal Law § 81c (1)—

Error committed by the court in submitting the question of defendant's guilt of a lesser degree of the offense charged cannot be prejudicial to defendant. G.S. 15-170.

3. Robbery § 1b—

G.S. 14-87 does not divide robbery into separate offenses but merely provides a more severe punishment if the offense of common law robbery is committed or attempted with the use or threatened use of firearms or other dangerous weapons.

4. Criminal Law § 77d—

The Supreme Court is bound by the record as certified.

5. Criminal Law § 22—

Where a new trial is awarded upon defendant's appeal from conviction of a lesser degree of the crime charged, the new trial will be upon the original bill of indictment charging the graver offense.

STATE *v.* CHASE.

APPEAL by defendant from *Bennett, Special Judge,* at January Term, 1950, of McDOWELL.

The defendant was tried on separate bills of indictment charging him with robbery with firearms and with kidnapping one Grover Williams.

The State's evidence tends to show that the defendant and an unidentified accomplice called Grover Williams from his home in Marion, North Carolina, around 9:00 o'clock at night, on 19 December, 1949, and forced him into an automobile; that after driving a distance of some 12 miles, the defendant stopped the car, put a gun in Williams' face and ordered him not to move; and directed his companion to get everything Williams had; that the defendant's accomplice took over $800.00 from the person of the prosecuting witness and then ordered him to get out of the car and start walking and not to look back.

The jury returned a verdict as follows:

"Not guilty of kidnapping.

"Not guilty of armed robbery.

"Guilty of common law robbery."

From the judgment entered on the verdict, the defendant appeals and assigns error.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Proctor & Dameron for defendant.

DENNY, J. The defendant assigns as error the following portion of his Honor's charge: "If the State of North Carolina has satisfied you beyond a reasonable doubt that the defendant, Otis Chase, unlawfully and by means of force and placing in fear the person of the witness Williams, without consent, and against his will and wilfully carried away without felonious intent to deprive the true owner of said money and to appropriate any part of it to his own use, the Court instructs you to return a verdict of Guilty of Common Law Robbery."

There is error in this portion of the charge, in that the jury is instructed that it may return a verdict of guilty of common law robbery, even though it finds the taking was without felonious intent. *S. v. Lunsford,* 229 N.C. 229, 49 S.E. 2d 410.

The defendant objects and excepts, not only to this portion of the charge, but to other parts as well, wherein the jury was instructed it might return a verdict of guilty of common law robbery on the ground that all the evidence clearly indicated that if the defendant was guilty of any robbery he was guilty of robbery with firearms.

We concede that upon the evidence adduced in the trial below it would have been proper to have limited the jury to one of two verdicts: Guilty

of robbery with firearms or not guilty. *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *S. v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Cox,* 201 N.C. 357, 160 S.E. 358. But his Honor elected to instruct the jury that if the State had failed to satisfy it beyond a reasonable doubt that the defendant was guilty of "armed robbery," it might return a verdict of guilty of common law robbery. Conceding this to be error, we have consistently held that such error is not harmful to the defendant. *Brown, J.,* in speaking for the Court in *S. v. Quick,* 150 N.C. 820, 64 S.E. 163, said: "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the State, and not to him." To like effect is *S. v. Matthews,* 142 N.C. 621, 55 S.E. 342. "An error on the side of mercy is not reversible," *S. v. Fowler,* 151 N.C. 731, 66 S.E. 567. *S. v. Rowe,* 155 N.C. 436, 71 S.E. 332; *S. v. Casey,* 159 N.C. 474, 74 S.E. 625; *S. v. Blackwell,* 162 N.C. 672, 79 S.E. 310.

Moreover, robbery is not divided into separate offenses by the statute. G.S. 14-87. As *Barnhill, J.,* said in *S. v. Jones,* 227 N.C. 402, 42 S.E. 2d 465: "The primary purpose and intent of the Legislature in enacting Chap. 187, P.L. 1929, now G.S. 14-87, was to provide for more severe punishment for the commission of robbery when such offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. It does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed. *S. v. Keller,* 214 N.C. 447, 199 S.E. 620."

If the instruction on common law robbery to which defendant excepts were correct, we would not disturb the verdict below, G.S. 15-170. However, since such instruction was not in substantial compliance with the requirements of the law, the defendant is entitled to a new trial.

It is quite possible the charge as certified may not be correct. Even so, we have checked the part set out herein, to which the defendant excepts, with the certified transcript from the court below, and it is in accord therewith; and this Court is bound by the record as certified. *S. v. Cockrell,* 230 N.C. 110, 52 S.E. 2d 7; *Mason v. Commissioners of Moore,* 229 N.C. 626, 51 S.E. 2d 6; *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740.

The new trial will be on the bill of indictment charging the defendant with robbery with firearms, as laid. The verdicts rendered by the jury in the trial below, on the bill charging the defendant with robbery with firearms, were bottomed on the same, not separate, counts. *S. v. Hampton,*

210 N.C. 283, 186 S.E. 251. Therefore, the verdicts rendered on this bill will be disregarded and the trial will be *de novo*. *S. v. Correll,* 229 N.C. 640, 50 S.E. 2d 717, in which opinion *Winborne, J.,* cited our numerous cases in support of this view. See also *Trono v. United States,* 199 U.S. 521, 50 L. Ed. 292.

For the reasons stated, there must be a

New trial.

CARL P. WORLEY, CHAIRMAN, DR. R. E. EARP, PAUL KELLER, DR. B. L. AYCOCK, RAIFORD OLIVER, RALPH MEDLIN, HUBERT MASSENGILL, GILBERT BOYETTE, AND G. WILLIE LEE, TRUSTEES OF JOHNSTON MEMORIAL HOSPITAL, v. COUNTY OF JOHNSTON, BOARD OF COMMISSIONERS OF JOHNSTON COUNTY, R. P. HOLDING, CHAIRMAN, AND JESSIE H. AUSTIN, J. B. WOOTEN, J. DOBBIN BAILEY AND H. M. JOHNSON; J. NARVIN CREECH, TREASURER OF JOHNSTON COUNTY, AND J. MARVIN JOHNSON, AUDITOR OF JOHNSTON COUNTY.

(Filed 22 March, 1950.)

Taxation § 11—

Where the resolution of the County Commissioners in submitting to a vote the question of issuing bonds for a public hospital uses the word "buildings," and it is later found that a surplus will remain after the erection and equipment of the main hospital building, such surplus may be used for the purpose of erecting on the hospital grounds a home for nurses, technicians and others engaged in essential employment incidental to the proper operation of the hospital. G.S. 131-126.18, G.S. 153-77, as amended by Chap. 766, Session Laws of 1949.

APPEAL by defendants from *Morris, J.,* at Chambers, 7 February, 1950. From JOHNSTON. Affirmed.

This was a suit to determine the right of the trustees of Johnston Memorial Hospital to use unexpended funds remaining from a county bond issue for the erection of a public hospital for the purpose of erecting on the hospital grounds a nurses' home.

It was alleged in the complaint that pursuant to proper resolution of the Board of County Commissioners of Johnston County declaring that it was necessary for the benefit of the inhabitants of the County that a building or buildings be erected to be used as a public hospital, to cost $275,000 in addition to Federal and State funds available for that purpose, the question of issuing bonds in that amount and levying taxes to pay the principal and interest thereof was duly submitted to the voters of the County, and the proposition approved by a vote of 3978 for and 171 against. The bonds have been issued and sold, and contracts have

been let for the erection of a hospital building on property belonging to the County, the building to be a four-story building providing 100 beds and all incidental facilities and equipment. Owing to the decrease in the cost of construction, after using the Federal and State funds allocated and set aside for this building, it has been ascertained that there will be an unexpended surplus of $36,000 which the trustees of the hospital desire to use for the erection of a nurses' home on the hospital grounds. It was alleged that due to the location of the hospital near the northern limits of the Town of Smithfield, some distance from the principal residential section and from available hotel or other housing facilities, it was necessary for the proper operation and conduct of the hospital that a building be erected to provide housing for nursing, technical, and other essential hospital service, and the plaintiffs ask that the surplus funds not needed for the completion and equipment of the main hospital building be paid over to them for the erection and completion of this additional building.

The defendants admit all the allegations of fact set out in the complaint, but, doubting their authority in law to pay over to the plaintiffs any funds for any other purpose than the erection and equipment of the main hospital building, ask the court for judicial determination of their power to use public funds for the purpose proposed.

By stipulation this cause was submitted to the court for decision on the pleadings and affidavit, jury trial being waived. Accordingly Judge Morris heard the matter at chambers, and found that it was proper and necessary to the full enjoyment by the public of the privileges and benefits to be derived from the hospital building that another building be erected on the hospital grounds for the use of nurses and others employed in attendance on the hospital, and thereupon directed that defendants pay over to plaintiffs as trustees of Johnston Memorial Hospital for this purpose the surplus funds asked for whenever it should satisfactorily appear that a surplus in fact existed, over and above the cost of erecting and furnishing the main hospital building, and plaintiffs were empowered in that event to use this unexpended fund for the erection of a nurses' home.

Defendants excepted and appealed.

Lyon & Lyon for plaintiffs, appellees.

Hugh A. Page for defendants, appellants.

DEVIN, J. We think the court below has ruled correctly in holding, on the facts here shown, that the erection of another building on the hospital grounds for the use of nurses, technicians, and others engaged in essential employment incident to proper hospital care and attention was

included in the proposal for the construction of a public county hospital, and that the surplus not needed for the completion of main hospital building might be used for this purpose.

In the original resolution of the Board of County Commissioners submitting to popular vote the question of issuing bonds and levying taxes for a county hospital the word buildings was used, indicating it was contemplated the funds might be used for other building essential to the service to be rendered the people of the County in addition to and in connection with the main hospital building.

It may be noted also that G.S. 153-77, which empowers the issuance of bonds for the erection and purchase of hospitals, was amended by Chap. 766, sec. 3, Session Laws 1949, to include also hospital facility, and "hospital facility" in turn was defined in the same Act in sec. 2 (amending G.S. 131-126.18) as including specifically "nurses' homes." True, these amendments were enacted subsequent to the vote on the bond issue, but they were in force when it was ascertained a surplus would be available and when this suit was instituted.

The proposed use of unexpended funds presently available after the completion of the main hospital building for the purpose of erecting on hospital grounds a nurses' home may not be held to be in excess of, or a departure from, the general purpose declared in the original resolution of the Board of County Commissioners and submitted to the electorate for their approval. This conclusion on the facts here presented is supported by the recent decision of this Court in *Atkins v. McAden,* 229 N.C. 752, 57 S.E. 2d 484. In view of later enactments, the decision in *Denny v. Mecklenburg County,* 211 N.C. 558, 191 S.E. 26, is not controlling on the facts of this case.

Judgment affirmed.

WILLIAM ELBERT LANGSTON ET AL. v. ALLIE BARFIELD.

(Filed 22 March, 1950.)

Wills § 33f—Devise held for life with unlimited power of disposition for benefit of life tenant.

The will devised a life estate to a beneficiary with power to sell all or any part of the lands or appurtenances, provided the proceeds would add to her common comforts and necessities of life, but making her the sole judge of the time and amount of such sales, with further provision that if any of the lands should remain unsold at the time of the beneficiary's death the "residue" should go to testator's other named nieces and nephews in fee. *Held:* The first taker has the right to sell any or all of the lands as well as timber therefrom, and is entitled exclusively to the

proceeds of sale, the sole interest of the remaindermen being in the lands which may remain unsold at the time of the first taker's death.

APPEAL by defendant from *Burgwyn, Special Judge,* January Term, 1950, of JOHNSTON.

Proceeding under Declaratory Judgment Act to determine and declare rights of devisees under a will.

Joseph T. Langston, late of Johnston County, died 8 June, 1948, leaving a last will and testament in which he devised certain lands as follows:

"Item Three: I give and devise to my beloved niece Allie Barfield my two tracts of land (a 56-acre tract and a 30-acre tract, describing them). This devise to the said Mrs. Allie Barfield is for the term of her natural life, but on these specific conditions. If, during her life time, she should need to sell any or all of said land or any appurtenances thereto belonging she may do so, provided such sale and the proceeds therefrom will add to her common comforts and the common necessities of life; and I further specifically provide that she may be the sole judge as to whether she may sell any of said lands; and in the event that she should become disabled to attend to her own personal business affairs, I direct that same, or any part thereof, may be sold by the power of the Court upon a petition filed by her husband or other close friend or relative.

"Item Four: Subject to the life estate and all the provisions and conditions as set out in item three of this my last will and testament, should any remain unsold at the time of her death, I give and devise the residue, be that the whole of the two tracts of land or any unsold part thereof, to the following nephews and nieces of mine: (naming the plaintiffs herein), and this devise is in fee simple. The devise herein made to my several nephews and nieces is made *per capita,* that is to say, that they are to share alike in the division of such of my land as may come to them under the terms of this my last will and testament."

It is conceded that the defendant has sold the timber on one of the tracts of land to Guy C. Lee for $4,100, and has used $2,500 of the amount to pay the costs of an unsuccessful caveat filed by the plaintiffs.

The trial court adjudged and declared the rights of the parties as follows:

1. That the defendant, Allie Barfield, is vested with a life estate in the lands devised in Item Three, "with the power and right of disposal of said lands and appurtenances, or any part of any, during her lifetime, provided such sale and the proceeds therefrom are added to the common comforts and necessities of her life."

2. That the plaintiffs are devised a remainder estate in fee simple in said lands "share and share alike, *per capita,* subject to the life estate

of the defendant and her power of disposal devised to her as declared above."

3. That from any sale of the lands or appurtenances devised, or any portion thereof, by the defendant during her lifetime, "the defendant shall be entitled only to the value of her life estate in the proceeds of the sale and the balance of said proceeds shall be the property of the plaintiffs as remaindermen in said lands and this declaration shall apply to the proceeds of the sale of the timbers from the lands admitted by the defendant in her answer to have been made to Guy C. Lees, except as to $2500.00 thereof applied by her in payment of the costs of the caveat."

From the declaration and judgment entered, the defendant appeals, assigning error.

Hooks & Mitchiner and William R. Britt for plaintiffs, appellees.
Wellons, Martin & Wellons for defendant, appellant.

STACY, C. J. The immediate question for decision is whether the defendant must account to the plaintiffs for a portion of the proceeds derived from the sale of the timber on one of the tracts of land. The trial court answered in the affirmative. We are inclined to a different view.

In the first place, Allie Barfield who was most assuredly the special object of the testator's bounty, is devised a life estate in the lands in question with certain conditions attached including the appurtenant "to sell any or all said lands" and use "the proceeds therefrom," *i.e.,* the whole of the proceeds, for her common comfort and necessities of life. This is more than a naked power of sale attached to the life estate such as appeared in the case of *Darden v. Matthews,* 173 N.C. 186, 91 S.E. 835. More nearly in point, we think, is the case of *Burcham v. Burcham,* 219 N.C. 357, 13 S.E. 2d 615. Here, as there, viewing the will in its entirety, it seems that the testator intended the remaindermen to take the "residue" of the lands or that which remained unsold at the death of the life tenant. *Trust Co. v. Heymann,* 220 N.C. 526, 17 S.E. 2d 665; *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Hardee v. Rivers,* 228 N.C. 66, 44 S.E. 2d 476. The language of Item Four is, that if any of the lands should remain unsold at the death of the life tenant, "I give and devise the residue" to my nephews and nieces, naming the plaintiffs herein, and they are to share alike in the division of "such of my lands as may come to them under the terms of this my last will and testament." Clearly the testator intended that the life tenant should use all of the proceeds from any sale or sales for her own common comfort and necessities of life. The remaindermen are to share alike in the division of any

lands that may come to them under the will, not in the proceeds of any sales made by or for the benefit of the first taker.

Secondly, the plaintiffs concede that the defendant has the right to sell the timber and convey full title thereto. Indeed, this would seem to follow necessarily from the language of the will. Not only is the first taker empowered to sell any or all of the lands in question, but she is also made the sole judge of the time and amount of such sales; and in case of her disability or inability to act, further provision is made whereby sales may be had for her benefit.

The case is controlled by the directions of the testator as expressed in his will. *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888; *Smith v. Mears, supra; Richardson v. Cheek,* 212 N.C. 510, 193 S.E. 705; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Hampton v. West,* 212 N.C. 315, 193 S.E. 290.

Declaration and judgment will be entered in accordance with this opinion.

Error and remanded.

CHARLEY SCARBORO ET AL. v. MARY MORGAN, ALIAS MARY SCARBORO,
and
MARY SCARBORO v. CHARLEY SCARBORO, ADMR., ET AL.

(Filed 22 March, 1950.)

1. Appeal and Error § 6c (2)—

A sole exception and assignment of error to the order of the court allowing the adverse party's motion to strike certain allegations from the pleadings presents only the question whether error appears on the face of the record.

2. Appeal and Error § 40f—

The Supreme Court will not attempt to chart the course of the trial on appeal from an order allowing the adverse party's motion to strike allegations from the pleadings, and the order will not be disturbed when no harm results to appellant therefrom.

APPEAL by plaintiffs in the first case above mentioned, from *Bone, J.,* September-October Term, 1949, of JOHNSTON.

In the first action the children and heirs at law of Everette Scarboro, who died in August, 1948, seek to recover possession of homestead or house and lot in Johnston County, of which their father died seized. The defendant in this action claims to be in possession as the surviving

widow of the deceased, and asks that her dower be allotted in the homeplace. By amendment other lands were also brought into the case.

In the second action, the alleged widow seeks to have her year's support set aside out of the estate of the deceased. The two cases were consolidated for purpose of trial, but a juror was withdrawn and a mistrial ordered. The appeal is in the first case.

The claim of widowhood is the crux of the matter now at issue. It is alleged by the children of the deceased that the marriage of Mary Morgan to their father was bigamous, in that her prior marriage to Herman Morgan was still subsisting at the time of her purported marriage to their father.

By amendment to her answer the alleged widow avers that at the June Term, 1949, Wilson Superior Court, her marriage to Herman Morgan was annulled and declared void *ab initio*.

To this amendment the children of the deceased replied (1) that the judgment of annullment in Wilson County could have no effect upon the present pending action and (2) that the judgment was procured by fraud.

On motion of the alleged widow the allegations in the reply of the heirs at law that the judgment in Wilson County was procured by fraud was stricken on the ground that it constituted a collateral attack and therefore would not be admissible on the trial of the instant cause.

From this ruling the children of the deceased "objected and excepted . . . and assign same as error."

Mary Hill LeHew, Hooks & Mitchiner, and Leon G. Stevens for plaintiffs, appellants.

Lyon & Lyon and Sharpe & Pittman for defendant, appellee.

STACY, C. J. The single imputed error to the order striking the allegations of fraud in the procurement of the Wilson County judgment of an annullment presents only the question whether error appears on the face of the record. *Terry v. Coal Co., ante,* 103, 55 S.E. 2d 926; *Clodfelter v. Gas Corp., ante,* 343, 56 S.E. 2d 600.

Moreover, if the judgment be without significance or effect in the present proceeding, as the plaintiffs allege, then no harm has come to them from the ruling on the motion to strike. The case can readily be tried without the deleted allegations. *Parker v. Duke University,* 230 N.C. 656, 55 S.E. 2d 189. Nor is it according to precedent for this Court to chart the course of the trial on motions to strike portions of the pleadings. *Pemberton v. Greensboro,* 205 N.C. 599, 172 S.E. 196; *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308; *Penny v. Stone,* 228 N.C. 295, 45 S.E. 2d 362. The appeal seems to have been taken out of the abundance of caution.

The error assigned is insufficient to require a disturbance of the ruling on the motion to strike. Hence, the result is an affirmance of the judgment. *Town of Burnsville v. Boone, ante,* 577.

Affirmed.

STATE v. JAMES ROBERT PARSONS.

(Filed 22 March, 1950.)

1. Automobiles § 30d—

Testimony of two witnesses to the effect that at the time in question defendant was drunk or intoxicated, *held* sufficient upon the question to be submitted to the jury in a prosecution for drunken driving.

2. Criminal Law § 53i—

Charge of the court as to the scrutiny to be given testimony of defendant in his own behalf, *held* without error.

APPEAL by defendant from *Rousseau, J.,* December Term, 1949, of WILKES.

Criminal prosecution on indictment charging the defendant with operating a motor vehicle on the public highways of Wilkes County while under the influence of intoxicants.

The record discloses that on the afternoon of 4 September, 1949, the defendant and one Ward Snarr were traveling in the same direction in automobiles on the Roaring River road near Ronda in Wilkes County. Snarr first passed the defendant and apparently irritated him by his driving. The defendant then passed Snarr, stopped his car and backed it into the Snarr car. The two then engaged in a bit of name calling and some quarreling.

The witness Snarr testified that in his opinion the defendant was drunk. C. G. Johnson, a bystander, also testified that in his opinion the defendant was "under the intoxication of something at the time." The arresting officer said that when he arrested the defendant some three hours later he was not then drunk, but that he did have the odor of an intoxicant on his breath.

The defendant testified that he was not drunk; that he had not had any liquor at all that day, but did admit he had taken a bottle of beer around 10 or 10:30 o'clock that morning. He said he was only provoked by Snarr's discourteous driving on the highway.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Ninety days on the roads; also driver's license to be surrendered to the Clerk for transmission to Motor Vehicle Bureau for purposes of revocation.

Defendant appeals, assigning error.

Attorney-General McMullan and John R. Jordan, Jr., Member of Staff, for the State.

Trivette, Holshouser & Mitchell for defendant.

STACY, C. J. On the hearing, the case resolved itself into a disputed issue of fact determinable alone by the jury. The State's evidence taken in its most favorable light was amply sufficient to survive the demurrer. The defendant's evidence, if believed, would require an acquittal. The jury accepted the State's version of the matter. See *S. v. Kelly,* 227 N.C. 62, 40 S.E. 2d 454.

The exceptions to the charge present no new question of law or one not heretofore considerd in prior decisions. The instruction that the defendant "has a direct interest in your verdict . . . more interest than any other witness," etc., finds direct support in the case of *S. v. Davis,* 209 N.C., 242, 183 S.E. 420.

No reversible error having been made to appear, the verdict and judgment will be upheld.

No error.

MRS. ETHEL BOWLIN BUMGARNER v. CONRAD BUMGARNER.

(Filed 22 March, 1950.)

1. Actions § 9: Pleadings § 19c—

The service of an amendment to the original complaint, even though an additional summons is issued and served therewith inadvertently, does not constitute a new action, and demurrer on the ground that the amendment, in itself, fails to state a cause of action, is properly denied, the original complaint as amended being sufficient.

2. Divorce § 12—

The findings of the court on motion for alimony *pendente lite* are solely for the purpose of the motion and are not binding on the parties nor competent upon the trial of the issues.

APPEAL by defendant from *Rousseau, J.,* at October Term, 1949, of WILKES.

This is an action for alimony without divorce.

Demurrer to the original complaint was sustained. The plaintiff thereafter amended her complaint, which together with another summons was served on the defendant.

From an order granting alimony *pendente lite* and counsel fees, the defendant appeals and assigns error.

W. H. McElwee, Jr., for plaintiff.
Trivette, Holshouser & Mitchell for defendant.

PER CURIAM. The defendant demurs *ore tenus* in this Court on the ground that the issuing and serving of a second summons, with a copy of the amended complaint, constitutes a new action; and, that the allegations in the amended complaint are insufficient to give the court jurisdiction in a suit for alimony.

The so-called amended complaint is only an amendment to the original complaint in this cause, and it is so stated therein. We think the complaint as amended does allege sufficient facts, if proven, to support a claim for alimony without divorce.

The issuing and serving of an additional summons in connection with the service on the defendant of the amendment to the complaint, would seem to have been an inadvertence, and will be treated as surplusage. The parties were already in court. Furthermore, we think an examination of the record clearly supports the view that it was not the intention of the plaintiff to institute a new action.

On a motion for alimony *pendente lite* and counsel fees, the judge finds the facts from the pleadings, affidavits and other competent evidence that may be offered in support of plaintiff's allegations, for the purposes of the motion, but the facts so found are not binding on the parties nor receivable in evidence on the trial of the issues. *Moore v. Moore,* 185 N.C. 332, 117 S.E. 12.

The defendant will have ample opportunity to set up his defense or defenses to the plaintiff's cause of action before the case is disposed of on the trial of the issues. In the meantime, the allotment of temporary subsistence and counsel fees will be upheld. *Phillips v. Phillips,* 223 N.C. 276, 25 S.E. 2d 848.

Affirmed.

T. P. LEE v. MATTIE E. RHODES AND HUSBAND, H. W. RHODES.

(Filed 22 March, 1950.)

Limitation of Actions § 5b—

The three year statute begins to run against a cause of action to reform an instrument for mutual mistake from the time the mistake is discovered or should have been discovered in the exercise of due diligence, and conflicting evidence in respect thereto presents a question for the jury and its verdict thereon is determinative. G. S. 1-52 (9).

APPEAL by defendants from *Bone, J.*, at September-October Term, 1950, of JOHNSTON.

Civil action instituted 2 January, 1946, to recover land.

Defendants denied plaintiff's right to recover the land, and averred that a paper writing from them to him, dated 5 January, 1931, and registered 6 January, 1931, and in form a deed, under which plaintiff claims title to the lands in question, was intended to be a mortgage deed, as security for an indebtedness then incurred, but that by mutual mistake of the parties the defeasance clause was omitted, and they asked that the writing be reformed accordingly. Plaintiff in reply denied that there was any mistake, and plead in bar of defendants' right of action the three years statute of limitation, G.S. 1-52 (9), and also the ten years statutes of limitation, G.S. 1-47 (4) and G.S. 1-56. And upon the trial in Superior Court both parties offered evidence tending to support their respective allegations. On the issue of the statute of limitations the court limited the instructions to the three years statute. The jury found with defendants on their plea of mutual mistake, but also found that their cause of action thereon was barred by the statute of limitations.

From judgment for plaintiff on verdict rendered, defendants appeal to Supreme Court and assign error.

J. Ira Lee, C. C. Canaday, E. J. Wellons, and Jane A. Parker for plaintiff, appellee.

Lyon & Lyon and A. M. Noble for defendants, appellants.

PER CURIAM. Careful consideration of the assignments of error presented by appellants on this appeal fail to show error in the trial below on the determinative issue in respect to the statute of limitations on defendants' right of action for reformation of the paper writing in question on ground of mutual mistake. The statute in such cases begins to run from the discovery of the mistake, or when it should have been discovered in the exercise of due diligence. *Moore v. Casualty Co.*, 207 N.C. 433, 177 S.E. 406, and numerous other cases.

The trial judge presented the issue to the jury in the light of this principle. The evidence of the respective parties as shown in the record of case on appeal is in conflict,—thus presenting a question for the jury, and the jury has answered against defendants.

Hence, in the judgment below, we find

No error.

STATE v. ADA WAYNE VINSON.

(Filed 22 March, 1950.)

Criminal Law § 81b—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendant from *Bone, J.,* November Term, 1949, of WAYNE. Affirmed.

Defendant was indicted for attempting to burn an uninhabited house. There was verdict of guilty as charged, and from judgment imposing sentence the defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

J. Faison Thomson for defendant.

PER CURIAM. One member of the Court, *Justice Barnhill,* not sitting, and the remaining members being evenly divided in opinion whether the judgment should be affirmed, or reversed on the motion to nonsuit, in accord with the practice of the Court the judgment of the Superior Court is affirmed as the disposition of the appeal without becoming a precedent. *Howard v. Coach Co.,* 216 N.C. 799, 4 S.E. 2d 449.

Affirmed.

TRUSTEES OF WATTS HOSPITAL, A NORTH CAROLINA CORPORATION; JOHN SPRUNT HILL; SARA V. WATTS MORRISON AND HUSBAND, CAMERON MORRISON; GEORGE WATTS HILL AND WIFE, ANN McCULLOCH HILL; VALINDA HILL DuBOSE AND HUSBAND, D. ST. PIERRE DuBOSE; AND FRANCES HILL FOX AND HUSBAND, HERBERT FOX, v. BOARD OF COMMISSIONERS FOR THE COUNTY OF DURHAM; R. L. BRAME, CHAIRMAN, GEORGE F. KIRKLAND, S. LEROY PROCTOR, JAMES P. McGUIRE AND CLAUDE L. STONE, MEMBERS OF THE BOARD OF COMMISSIONERS FOR THE COUNTY OF DURHAM, NORTH CAROLINA; AND THE COUNTY OF DURHAM; CITY OF DURHAM; AND A. R. WILSON, GUARDIAN AD LITEM FOR ALL PARTIES WHO HAVE OR MIGHT HAVE ANY RIGHT, TITLE OR INTEREST WHATSOEVER IN THE PROPERTY INVOLVED IN THIS CONTROVERSY, WHETHER IN ESSE OR NOT IN ESSE, KNOWN OR UNKNOWN, AS WELL AS CITIZENS, TAXPAYERS, OR OTHER INTERESTED PARTIES.

(Filed 29 March, 1950.)

1. Trusts § 20b—

When subsequent changes in conditions not anticipated by the creator of a trust threaten the destruction of the trust and the loss of the trust estate, a court of equity has power to modify the terms of the trust to the extent necessary to preserve the trust estate and to effectuate the primary purpose of the creator of the trust.

2. Courts § 3a—

The Superior Court possesses all the powers inherent in a court of equity prior to 1868.

3. Trusts § 20b—

Where, due to changed conditions, increase in population and charity load, and increase in operational costs, the maintenance of a charitable hospital is endangered because of lack of funds for necessary repairs and modernization, a court of equity has the power to modify the terms of the trust indenture for the hospital property and the trust endowment in order that the trustees may convey same to the county under an agreement for the perpetual operation of the hospital under the same name.

4. Taxation § 5—

The construction, maintenance, and operation of a public hospital by a county is a public purpose for which funds may be provided by taxation, Art. V, Section 3, of the Constitution of N. C., and bonds for this purpose may be issued upon approval of the qualified voters of the county. G.S. 131-126.23, G.S. 153, Art. 9 as amended.

5. Hospital § 6½—

A county which has acquired charitable hospitals has authority to execute operational leases to the trustees of the hospitals upon such terms and subject to such conditions as will carry out the purposes of G.S. 131, Art. 13B.

6. Counties § 14—

A county may accept deed from the trustees of a charitable hospital for the hospital property and endowment upon condition that the property be used for general hospital purposes and be operated under the same name, since notwithstanding the instrument conveys a base, qualified, or determinable fee, the estate will endure forever unless the county should voluntarily cease to use the property for hospital purposes or should voluntarily change the name of the hospital.

APPEAL by defendants from *Harris, J.*, at March Term, 1950, of DURHAM.

Civil action for modification of terms of trusts to preserve trust estates and to effectuate the primary purposes of the creator of the trusts.

The parties waived the right to a jury trial, and submitted the issues of fact as well as of law to the judge, who entered judgment as follows:

This cause coming on to be heard before the undersigned, Judge presiding over the Superior Courts of Durham County, and counsel for plaintiffs, counsel for defendants, and A. R. Wilson, Esquire, Guardian *Ad Litem,* having agreed that the Court might hear the evidence, find the facts, and render judgment thereon;

And the Court, after reading the pleadings, hearing the evidence and arguments of counsel, finds the following facts:

1. That this suit was instituted on the 13th day of March, 1950; that summonses have been served upon all of the defendants named in the title to this cause, and that answers have been filed by all of said defendants, and all of said parties are now properly before the Court.

2. That A. R. Wilson, who is found to be a suitable and discreet person, has been duly appointed guardian *ad litem* for all parties who have or might have any right, title or interest whatsoever in the property involved in this controversy, whether *in esse* or not *in esse,* known or unknown, as well as any other interested parties, and is authorized to represent such parties who may in any contingency become interested in the property referred to herein, and all parties for whom he has been appointed guardian *ad litem* are bound by the terms of this judgment.

3. That the plaintiffs are all *sui juris* and are either residents of Durham County, North Carolina, or Mecklenburg County, North Carolina, except the plaintiff corporation, Trustees of Watts Hospital, which is a nonprofit corporation organized for the purpose of conducting, operating and maintaining a hospital in the City of Durham, North Carolina, said hospital being known as Watts Hospital, which corporation was chartered by the General Assembly of North Carolina under Chapter 8 of the Private Laws of 1895; and Lincoln Hospital in the City of Durham, hereinafter referred to, is also a nonprofit corporation organized

for the purpose of conducting, operating and maintaining a hospital in the City of Durham.

4. That on the 2nd day of December, 1909, George W. Watts and wife, L. V. Watts, executed and delivered to Trustees of Watts Hospital by deed recorded in Deed Book 40, page 371, Registry of Durham County, a tract of land containing 25⅖ acres upon which is located the present hospital site of Watts Hospital; that the *habendum* clause of said deed restricted the use of said property to a hospital at which no charge for board, attention or nursing would be made to those unable to pay, and that if said property should cease for a period of six months to be used as a hospital for the sick at which board, attention and nursing would not be free to the indigent, that said land and improvements would revert to and revest in George W. Watts and his heirs.

5. That by indenture dated August 22, 1905, recorded in Deed Book 15, pages 440 and 441, Registry of Durham County, and by deed recorded in Deed Book 47 at page 48, dated April 24, 1913, Registry of Durham County, and by deed dated February 5, 1921, recorded in Deed Book 61, page 333, Registry of Durham County, George W. Watts and his wife executed and delivered to Trustees of Watts Hospital certain articles of personal property and certain tracts of real estate upon the condition that the income from said personal property and real estate be used for the benefit of a hospital at which no charge for board, attention or nursing would be made to those unable to pay, and if the terms of the various deeds of gift, which constitute what is now known as the Watts Hospital Endowment should not be complied with for a period of six months, that the articles of personal property and real estate therein conveyed to Trustees of Watts Hospital, should revert to and revest in the said George W. Watts and his heirs.

6. That George W. Watts died testate on the 7th day of March, 1921, a citizen and resident of Durham County, and his last will and testament was duly probated in Book of Wills 3, page 155, in the Office of the Clerk of the Superior Court of Durham County, North Carolina, in which will the said George W. Watts designated and named his wife, Sara V. Watts, and his daughter, Annie Louise Hill, as his residuary legatees.

7. That at the time of his death in 1921 the said George W. Watts was survived by his widow, Sara V. Watts, and his daughter, Annie Louise Hill, who constituted his sole heirs at law, and were also his sole residuary legatees as set forth in his last will and testament.

That on the 26th day of March, 1940, Annie Louise Hill died testate a citizen and resident of Durham County, North Carolina, leaving a last will and testament which was duly probated and recorded in Book of Wills 6, page 236, in the Office of the Clerk of the Superior Court of

Durham County, in which will the said Annie Louise Hill named her husband and three children, to wit: John Sprunt Hill, George Watts Hill, Valinda Hill DuBose and Frances Faison Hill (now Frances Hill Fox), as her residuary legatees; that said parties also constitute all of the heirs at law of the said Annie Louise Hill.

8. That the late George W. Watts, prior to giving the present Watts Hospital property to the Trustees of Watts Hospital, had built at his own expense a hospital on the property; that the hospital at that time had a capacity of seventy-one patient beds; that from time to time during his life Mr. Watts made other additions to the hospital, and at the time of his death in 1921 the hospital had a normal capacity of one hundred and thirty-six beds; that in 1927, through provisions made by Mr. Watts, an additional fifty beds were added, making one hundred and eighty-six; that since 1927 the normal capacity of the hospital has been increased by only seven beds, although by resorting to the expedient of lining beds up in the corridors and crowding additional beds in wards and rooms designed as supply stations, Trustees of Watts Hospital, in an effort to take care of emergency and overflow conditions, have provided accommodations for over two hundred and ninety patients, approximately one hundred more than normal capacity.

That another expedient to which Trustees of Watts Hospital have been forced to resort in order to meet increased demands has been the conversion of two adult bedrooms into a babies' ward, which contains thirty bassinets; that the toilet facilities are entirely inadequate, in that one toilet has to serve twenty-one resident staff doctors on duty all day and sixty-five regular staff doctors who make rounds once or twice a day; that another toilet has to serve for twenty-five administrative and clerical women; that there is only one toilet available for forty-three Negro maids; and that there is only one toilet available for as many as twenty patients and visitors in addition to three to eight nurses.

The initial cost of improvements on the Watts Hospital property amounts to approximately $1,500,000, although the replacement cost would be greatly in excess of this amount.

9. That at the time of the death of Mr. Watts in 1921 the Town of Durham had a population of 21,719 persons and the entire County of Durham a population of 42,219; that at the present time the population of the City of Durham has risen to approximately 75,000 to 80,000, and of the County of Durham, including the City, to 90,000 to 100,000; that this increase in population has necessarily resulted in an increase in the demands made upon Watts Hospital and the use of its facilities, which increase has been of a steady nature, as shown by "Exhibit E" attached to the complaint, which is found to correctly set forth the facts contained in said exhibit; that there has been a large increase in the

various services performed at Watts Hospital between the year 1930 and the year 1949, as shown from the following table:

	1930	*1949*	*Per Centage of Increase*
Normal Bed Capacity	186	193	.....
In-Patients Treated	3,563	10,405	192.0
Patient Days of Care	38,730	77,080	99.0
No. of Employees, including Student Nurses	153	470	207.0
Births	280	1,393	397.5
Major Operations	962	2,501	160.0
Minor Operations	1,724	5,618	226.1
Laboratory Tests	20,792	131,726	533.5
X-Ray Patients	1,859	23,745	1,177.3
X-Ray Services	3,947	32,585	725.6

10. That while the Watts endowment funds were augmented from time to time through the generosity of Mr. Watts, and while the *corpus* of these endowment funds have now grown to a point where they have a fair market value in excess of $630,000.00, the cost of the operation of the hospital has increased to such a point that the endowment funds, which in 1920 represented 14.2 per cent of the total expense of operation of the hospital, now represent only 2.8 per cent of the total expense of the operation of the hospital, although in the same period the endowment income has increased from $16,109.00 to $30,654.00; that during the same period the cost of operation of the hospital has increased from $113,447.00 to $1,109,974.00, and the average daily census of the hospital during this time has increased from 83.1 to 211.1, and the total number of patients from 2,321 to 10,405.

That the income from the endowment is now and for some years has been totally inadequate to provide free board, attention and nursing to those unable to pay for the same.

11. That on or about the 16th day of December, 1936, Trustees of Watts Hospital amended the Charter of said corporation by providing "No person shall be discharged or refused admission and attendance because of inability to pay unless the income from the Watts Hospital Endowment and other receipts for charitable purposes at such time have been exhausted."

12. That on the 14th day of May, 1938, and more than six months after said Charter had been amended as referred to under Finding of Fact No. 11, Annie Louise Hill and husband, John Sprunt Hill, and Sara V. Watts Morrison and husband, Cameron Morrison, sole heirs at law and residuary legatees of the late George W. Watts, executed and

delivered to the City of Durham and County of Durham a deed recorded in Deed Book 129, page 241, Registry of Durham County, quit-claiming and conveying to the said City of Durham and County of Durham all of their right, title and interest in and to the present Watts Hospital property and in and to the other real estate conveyed by the said George W. Watts to Trustees of Watts Hospital.

13. That on the 6th day of March, 1950, the City Council for the City of Durham unanimously passed a resolution "That the City of Durham quit-claim its interest in Watts Hospital property to the Trustees of Watts Hospital," and the City of Durham is now prepared to execute a quit-claim deed conveying any interest which it had or might have had in and to that property referred to in "Exhibit G" of the complaint, being deed from Cameron Morrison and others recorded in Deed Book 129, page 241, Registry of Durham County; that the City of Durham has no interest in said property or in the subject matter of this action.

14. That the condition of some of the buildings comprising Watts Hospital is such that repairs and improvements are immediately necessary; that recently part of one of the ceilings has become loosened, and that repairs and improvements are necessary on account of a "B" rating given the Dietary Department by the State of North Carolina and County of Durham Health Departments, and that permanent improvements, additions and repairs are now necessary and no funds are available for making same, all of the income being required for actual operating expenses.

That it will require the amount proposed to be expended at Watts Hospital from the proceeds of the bond issue to make the necessary repairs, improvements and additions, in addition to the amount allocated for use at Watts Hospital by the North Carolina Medical Care Commission, although the Medical Care Commission grant of $693,000.00 will not be available unless additional funds are raised for use at Watts Hospital.

15. That unless the needed repairs are made it is highly doubtful, and the Court is of the opinion that, Watts Hospital could not continue to operate as a hospital at which charity patients, or any appreciable number of charity patients, were received, in which event the beneficent purposes of the original donor of the trust would be destroyed, and would have failed almost completely.

16. That in view of the emergencies and exigencies which the Court finds to exist, and which are well known to trustees of Watts Hospital and the heirs of the late George W. Watts, the following plan has been proposed:

(a) Trustees of Watts Hospital would convey the Watts Hospital property described in paragraph 12 of the complaint to the County of

Durham upon condition that the property would continue to be used for hospital purposes and would bear the name Watts Hospital.

(b) The heirs at law of George W. Watts and Annie Louise Hill would convey any interest which they have or might have in said property to County of Durham upon condition that the same be used for hospital purposes and continue to bear the name Watts Hospital.

(c) Trustees of Lincoln Hospital would convey the Lincoln Hospital property to County of Durham upon condition that the property continue to be used for general hospital purposes.

(d) Durham Bank and Trust Company would be appointed as fiscal agent of Trustees of Watts Hospital to manage the Watts endowment, making the income therefrom available for the operation of Watts Hospital.

(e) Leases would be made from the County of Durham to the respective Trustees of Watts Hospital and Lincoln Hospital for the purpose of operating said hospitals.

(f) That all of the same be placed in escrow to be delivered upon the approval of the bond referendum under the terms of said original agreement, copy of which is attached to the complaint marked "Exhibit J."

17. That in furtherance of the above plan, and in order to insure compliance with the same, Trustees of Watts Hospital, the heirs of the late George W. Watts, and the late Annie Louise Hill, and the Trustees of Lincoln Hospital have executed to Durham Bank and Trust Company as Trustee in escrow agreement dated March 6, 1950, copy of which escrow agreement is attached to the complaint marked "Exhibit J," and Trustees of Watts Hospital have placed with Durham Bank and Trust Company as Trustee under said escrow agreement a deed to the County of Durham, copy of which is attached to the complaint marked "Exhibit I," and the heirs of the late George W. Watts and Annie Louise Hill have executed and delivered under said escrow agreement a deed to the County of Durham, a copy of which is attached to the complaint marked "Exhibit H," and Trustees of Lincoln Hospital have executed and delivered to Durham Bank and Trust Company as Trustee under said escrow agreement a deed to the Lincoln Hospital property, and Trustees of Watts Hospital have executed and delivered to Durham Bank and Trust Company as Fiscal Agent a fiscal agency agreement, copy of which is attached to the complaint marked "Exhibit K," to all of which reference is made and which are by reference incorporated in this judgment, and all of which should be ratified, affirmed and approved by the court.

18. That said plan represents the most feasible plan presented to the Court for the preservation of the terms of the trust of the late George W. Watts, and the Court finds that in order to prevent a destruction of the trust and to preserve and make it effective as near as may be possible in

accordance with the terms of the trust, it is necessary that said plan, or some similar plan, be put into operation.

19. That the plaintiffs have tendered to County of Durham said escrow agreement together with the instruments referred to therein, being:

(a) Proposed deed from John Sprunt Hill, *et als.,* to County of Durham.

(b) Proposed deed from Trustees of Watts Hospital to County of Durham.

(c) Proposed appointment from Trustees of Watts Hospital to Durham Bank and Trust Company as Fiscal Agent.

(d) Proposed deed from Trustees of Lincoln Hospital to County of Durham.

20. That the Commissioners for the County of Durham, realizing the necessity for a two million dollar hospital bond issue, have called a bond referendum to be submitted to the voters of Durham County on Saturday, the 22nd day of April, 1950, and have taken the necessary steps to provide for such bond election. However, the Commissioners for the County of Durham have taken the position that the County of Durham could not expend funds on Watts Hospital and Lincoln Hospital since, as a matter of law, the County of Durham was required to obtain a fee simple title to said property before any expenditures from the bond issue could be made upon either Lincoln Hospital or Watts Hospital, and have further taken the position that as to Watts Hospital they could not secure a fee simple title to the property for the reasons:

(a) That the Trustees of Watts Hospital and the Watts and Hill heirs would require that the County accept the property upon condition that the property be used for hospital purposes, and

(b) That the Hospital bear the name Watts Hospital, and

(c) For the further reason that Trustees of Watts Hospital and the heirs of the late George W. Watts and Annie Louise Hill do not have authority to convey the present Watts Hospital site freed from the terms of the deed of gift from George W. Watts and wife to Trustees of Watts Hospital.

21. That the County of Durham and Commissioners for the County of Durham have full authority under the law to accept said deeds from Trustees of Watts Hospital and the heirs of George W. Watts and Annie Louise Hill as proposed, with the restrictions that the property be used only for hospital purposes and that the hospital be known as Watts Hospital, with the provision that failure to comply with such conditions should cause the property to revert to Trustees of Watts Hospital, and at the same time would have the full legal authority to expend funds raised by the proposed bond issue on the Watts Hospital property; and

the Court finds that the said conditions that the property be used for hospital purposes and bear the name Watts Hospital are reasonable and proper, and the condition with reference to the use of the property for hospital purposes is necessary in view of the character of the original donation.

22. That the Court under its equitable powers has the authority to modify the terms of the original trust, and deems it necessary and advisable that this be done in such way as to permit and authorize the County of Durham to accept the proposed deeds and make expenditures provided by the bond issue in the event of a favorable vote by the citizens of the County of Durham on said referendum.

23. That it would be for the best interest of the County of Durham and all parties hereto that the orders hereinafter set forth be made by the Court.

24. That all parties having any vested interest in the property described in Paragraph 12 of the complaint and all parties who could possibly be affected are either in, or are represented in, Court.

25. That unusual circumstances and exigencies have arisen not contemplated by the late George W. Watts and which, had they been anticipated, would undoubtedly have been provided for, and in order to prevent the destruction of the trust and in order to preserve it as far as possible it is necessary that this Court in its equitable jurisdiction grant the relief imperatively required, and the following order entered in this case represents what in the opinion of the Court the original grantor of the trust would have dictated had he anticipated the emergencies which have arisen.

Now, Therefore, it is hereby ordered, considered, adjudged and decreed:

A. That the Endowment Indenture dated August 22, 1905, recorded in Deed Book 15, pages 440 and 441, Registry of Durham County (Exhibit A attached to the complaint) be modified as follows:

1. That the language contained in the third section thereof which reads as follows: "for the sick, at which board, attention and nursing shall be free to the indigent" be and the same is hereby deleted from said Endowment Indenture.

B. That the deed dated the 2nd day of December, 1909, recorded in Deed Book 40, page 371, Registry of Durham County (Exhibit B attached to the complaint) be modified as follows:

1. That the language contained in the first paragraph of the *habendum* clause of said deed, which reads as follows, be deleted therefrom: "at which no charge for board, attention or nursing shall be made to those unable to pay."

2. That the following language contained in paragraph 2 of said *habendum* clause be deleted: "for the sick, at which board, attention and nursing shall be free to the indigent."

C. That the deed recorded in Deed Book 47, at page 48, Registry of Durham County, dated April 24, 1913, (Exhibit C attached to the complaint) be modified as follows:

1. That the following language contained in two places in the *habendum* clause of said deed be deleted therefrom: "at which no charge for board, attention or nursing shall be made to those unable to pay."

D. That the deed recorded in Deed Book 61, page 333, Registry of Durham County, dated February 5, 1921, (Exhibit D attached to the complaint) be modified as follows:

1. That the following language contained in two places in the *habendum* clause of said deed be deleted: "at which no charge for board, attention or nursing shall be made to those unable to pay."

E. That, subject to said Escrow Agreement, Trustees of Watts Hospital be and they are hereby declared to be the owners in fee simple of the property described in the following deeds:

(1) Deed from George W. Watts and wife to Trustees of Watts Hospital recorded in Deed Book 15, pages 440 and 441, Registry of Durham County. (Exhibit A.)

(2) Deed from George W. Watts and wife, L. V. Watts, to Trustees of Watts Hospital recorded in Deed Book 40, page 371, Registry of Durham County. (Exhibit B.)

(3) Deed from George W. Watts and wife to Trustees of Watts Hospital recorded in Deed Book 47, page 48, Registry of Durham County. (Exhibit C.)

(4) Deed from George W. Watts and wife, Sara V. Watts, to Trustees of Watts Hospital recorded in Deed Book 61, page 333, Registry of Durham County. (Exhibit D.)

subject only to the conditions set forth in the deeds from Trustees of Watts Hospital and heirs of George W. Watts and Annie Louise Hill to County of Durham, said deeds being deposited in escrow and being the deeds marked "H" and "I" in the exhibits attached to the complaint.

F. That the deeds from Trustees of Watts Hospital and the heirs of George W. Watts and Annie Louise Hill deposited with the Escrow Agreement (Exhibits "H" and "I") would convey to the County of Durham a fee simple title to the property described therein, subject only to the conditions set forth in said deeds, and the County of Durham is hereby fully authorized and empowered to accept said deeds under the terms and conditions as set forth therein, freed from the restrictions and conditions contained in deed of George W. Watts and wife, L. V. Watts,

dated December 2, 1909, recorded in Deed Book 40, page 371, and referred to in the complaint as "Exhibit B."

G. That the Board of County Commissioners for Durham County is fully authorized and empowered, in its discretion, to call a bond election for the purpose of issuing bonds for the improvement of Lincoln Hospital and Watts Hospital; and if said bond election is approved by the citizens of Durham County said Board of County Commissioners is fully authorized and empowered to supervise the expenditure of the net proceeds from the sale of any bonds voted in such bond election, either as a Board or under the terms of General Statutes 131-126.21; and said Board of County Commissioners is further fully authorized and empowered, under the terms of General Statutes 131-126.20 (c) and 131-126.26, to make operational leases for Lincoln and Watts Hospitals with the respective trustees thereof, upon such terms and for such period or periods as said Board of County Commissioners may deem advisable.

H. The Board of County Commissioners for Durham County, Trustees of Watts Hospital, and any other parties to this action, are fully authorized and empowered to carry out the plan set forth herein for the conveyance of the Watts Hospital property and the Lincoln Hospital property to the County of Durham under the terms and conditions of said plan, and said parties are hereby fully authorized and empowered in doing so to take such steps as may be necessary to carry out the terms of said plan so long as the same are not inconsistent with the terms of this judgment.

I. The approval of the Court is specifically given to the acceptance by the County Commissioners of said deeds from Trustees of Watts Hospital, the heirs of the late George W. Watts and Annie Louise Hill, and Trustees of Lincoln Hospital, as embraced in the Escrow Agreement herein elsewhere referred to, and the execution of said instruments together with the Escrow Agreement and the Fiscal Agency Agreement by Trustees of Watts Hospital is hereby in all respects approved.

J. The net income from the Endowment known and referred to herein as the Watts Endowment shall be used exclusively for the purposes set forth in the original Endowment Indenture as recorded in Book of Deeds 15, at pages 440-441, Registry of Durham County, as modified by the terms of this judgment, and for no other purposes: Provided, however, such net income, or such portion thereof as might be required for such purpose, shall be expended in furnishing board, attention, and nursing to patients unable to pay for the same.

K. That the Court costs of this action are hereby taxed against Trustees of Watts Hospital.

The defendants excepted to the judgment and appealed, assigning errors.

Victor S. Bryant and Robert I. Lipton for plaintiffs, appellees.

Fuller, Reade, Umstead & Fuller for defendants, Durham County and the Board of Commissioners for the County of Durham, appellants.

A. R. Wilson for defendant, A. R. Wilson, Guardian ad Litem, appellant.

ERVIN, J. Equity looks at substance, and not form. When subsequent changes in conditions not anticipated by the creator of a trust threaten the destruction of the trust and the loss of the trust estate, a court of equity has power to modify the terms of the trust to the extent necessary to preserve the trust estate and to effectuate the primary purpose of the creator of the trust. *Hospital v. Cone, ante,* 292, 56 S.E. 2d 709; *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203; *Duffy v. Duffy,* 221 N.C. 521, 20 S.E. 2d 835; *Penick v. Bank,* 218 N.C. 686, 12 S.E. 2d 253; *Cutter v. Trust Co.,* 213 N.C. 686, 197 S.E. 542; 54 Am. Jur., Trusts, section 284. This equitable jurisdiction resided in the court below; for the Superior Court possesses all of the powers exercised by it as a court of equity prior to 1868. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 62.

For all practical purposes, two trusts are involved in this action. The subject matter of the first is the *Watts Hospital* property, and the subject matter of the second is the Watts Endowment property.

The findings of fact of the court make it manifest that drastic changes in conditions, which were entirely unforeseen at the time of the creation of the trusts, arose subsequent to the establishment of the trusts; that these changes in conditions created an emergency, which threatened the destruction of the trusts and the loss of the trust estates to the trustee and the beneficiaries of the trusts; and that in consequence modification of the terms of the trusts by the court was indispensable to the preservation of the trusts and the carrying out of the primary purposes of the creator of the trusts. Moreover, both the findings of fact and the record as a whole compel the conclusion that the judgment modifying the terms of the trusts is well conceived to accomplish these laudable ends.

The circumstances in the record indicate beyond cavil that George W. Watts intended his charities to be as permanent and perpetual as any human institutions can be. The corporate charter of the Trustees of Watts Hospital clearly discloses that the primary purpose motivating his gift of the hospital property to the Trustees was the establishment of a nonprofit hospital in Durham County "for the reception and treatment of persons who may need medical or surgical attendance during temporary sickness or injury." Under the statutes originally enacted as Chapter 933 of the 1947 Session Laws and now codified as Article 13B of Chapter 131 of the General Statutes, Durham County has plenary

power to construct, operate, and maintain nonprofit hospital facilities. For this reason, the sanctioned conveyance of the Watts Hospital property to Durham County upon the condition "that the . . . property shall be used for hospital purposes" insures the preservation of the trust estate for the benefit of the ultimate beneficiaries of the trust and the carrying out of the primary purpose of the creator of the trust for all time so far as these things can be done by human foresight and ingenuity in an uncertain world.

When George W. Watts gave the Watts Endowment property to the Trustees of Watts Hospital, his primary intent was to earmark the net income arising from such property for the service of poor patients unable to pay Watts Hospital for their board, attention, and nursing. The judgment makes it certain that the net income arising from this property will be used for the benefit of persons answering this description in conformity to the primary purpose of the creator of the trust throughout the foreseeable future.

The construction, maintenance, and operation of a public hospital by a county is a public purpose for which funds may be provided by taxation under Article V, Section 3, of the Constitution. See: *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668, 113 A.L.R. 1195; *Burleson v. Spruce Pine,* 200 N.C. 30, 156 S.E. 241; *Nash v. Monroe,* 198 N.C. 306, 151 S.E. 634; *Armstrong v. Comrs.,* 185 N.C. 405, 117 S.E. 388. In consequence, "the cost of planning and acquiring, establishing, developing, constructing, enlarging, improving or equipping any hospital facility or the site thereof may be paid for . . . from the proceeds of the sale of bonds or other obligations" of a county under G.S. 131-126.23 if such action is first approved by a majority of the qualified voters of the county who shall vote on the proposition in an election conducted under the County Finance Act, *i.e.,* Article 9 of Chapter 153 of the General Statutes as amended by Section 8 of Chapter 497 of the 1949 Session Laws.

Where a county is authorized to issue its bonds for these purposes by a majority of the qualified voters voting on the proposition in an appropriate election, the proceeds of the bonds may be expended for such purposes under the supervision of the board of commissioners of the county, or under the supervision of some officer, or board, or agency of the county designated by the board of commissioners pursuant to G.S. 131-126.21. Besides, a county, which has acquired an existing hospital facility by purchase, gift, or otherwise, is expressly authorized by the statute to lease such facility to any nonprofit association or corporation for operation on such terms and subject to such conditions as will carry out the purposes of Article 13B of Chapter 131 of the General Statutes. G.S. 131-126.20 (c). Hence, the provisions of the judgment relating to

the execution of operational leases and the expenditure of the proceeds of any bonds issued under the statutes cited above are proper.

The deeds from the Trustees of Watts Hospital and the heirs and residuary devisees of George W. Watts and Annie Louise Hill convey to Durham County a base, qualified, or determinable fee. *Paul v. Willoughby,* 204 N.C. 595, 169 S.E. 226; *Henderson v. Power Co.,* 200 N.C. 443, 157 S.E. 425, 80 A.L.R. 497; *West v. Murphy,* 197 N.C. 488, 149 S.E. 731. Notwithstanding this fact, the court rightly authorized Durham County to accept these deeds. For all practical purposes, they vest in Durham County title to the Watts Hospital property in fee simple absolute; for the estate which they convey will endure forever unless Durham County voluntarily ceases to use the property for hospital purposes or voluntarily changes the name of the hospital standing thereon. Indeed, the statute does not make the acquisition of title by the county a condition precedent to the extension of aid. G.S. 131-126.26.

For the reasons given, the judgment of the trial court is

Affirmed.

STATE v. ELMER MATTHEWS AND JIM COOK.

(Filed 29 March, 1950.)

1. Criminal Law §§ 52a (7), 56—

An instruction that the court grants a nonsuit on the offense charged in the indictment, followed by submission of the case on the question of defendants' guilt of a lesser degree of the offense charged, does not amount to a nonsuit on the indictment, G.S. 15-173, and perforce will not support a motion in arrest of judgment upon conviction of the lesser degree of the offense charged, C.S. 15-169.

2. Criminal Law § 54e—

Where the jury renders a verdict that defendants were guilty as aiders and abettors, the court has the power to give additional instructions, supported by the evidence, to the effect that persons aiding and abetting in the commission of the offense, all being present, are guilty of the offense, and to direct the jury to retire and reconsider, and to accept a proper verdict of guilty after such reconsideration by the jury.

3. Assault § 8c—

In order to constitute assault with a deadly weapon no special intent is required beyond the intent to commit the unlawful act, which will be inferred or presumed from the act itself.

4. Criminal Law § 33—

The admonition of the prosecuting witness after seeking out one defendant on his own initiative, "you had better come clean," *is held,* under

the circumstances of this case, not to render defendant's confession involuntary.

5. Same—

Where one defendant makes a voluntary confession and another defendant, without persuasion or inducement, admits the correctness of the statement in response to simple questioning, the confession is competent as against the second defendant.

6. Same—

The question of whether a confession is voluntary or involuntary must be determined upon the circumstances of each particular case.

DEFENDANTS' appeal from *Carr, J.*, October Term, 1949, EDGECOMBE Superior Court.

The defendants Matthews and Cook were tried on two bills of indictment consolidated in the trial because drawn upon the identical facts and considered as two counts in one indictment. The evidence was substantially as follows:

At the time of the occurrence a strike was in progress at the cotton mills located in the City of Tarboro, and the mills were being picketed by the strikers. J. D. Wyatt, a watchman who had been working inside the plant in that capacity during the strike, approached the gate of the mill for the purpose of entering for the discharge of his duties and found that he could not enter for the reason that the entrance was blocked by a mass of picketers. Jim Cook, one of the defendants and one of the strikers, was standing in front of the gate when Wyatt attempted to enter. When Wyatt parked his car Cook called to the "other boys" to come over, and 50 or 60 came over from one of the picket tents and got across the gate. This was on Wednesday morning; the same day a restraining order was put into effect to prevent mass picketing. Wyatt observed, "Well, looks like you all got it pretty well blocked this morning." Cook said that if Wyatt "went into that mill that morning or any other morning that the undertaker would have a job." Wyatt did not get to work that day nor the next day but returned to work Friday morning at 6 o'clock and that night "the shooting" constituting the assault occurred.

Wyatt as a witness states:

> "One of the bullets went into the room I was sleeping in; it came through the wall that divides my room and Hathaway's room; it came about six feet from me. My wife and all the other occupants of my house had gone to bed when the shots were fired, and the lights were out. I am Jim Cook's uncle. The front room being used by Mr. Hathaway was a living room. We use it for both. Sometimes the girl slept in there and sometimes she did not. After

Hathaway's wife came out there it was being used as a bedroom. During the month of September she was with me. She's been out there near 'bout ever since the strike has been on. The bullet that entered my room went through a window in Hathaway's room and then into the room that I was sleeping in.

"The room in which I slept is behind the living room. My bed is located directly behind the bed Mr. Hathaway was sleeping in. There is a window next to my bed. Two windows behind the house. If a person were to go around my house and stand in front of one of those two windows he would be facing my bed.

"I will not say positively whether Jim Cook has been to my house since my daughter has been sleeping in the living room. Jim and his wife were both out there one morning and we went off on a fishing trip together, since the strike, but I don't recall whether it was before or not. I won't say as to whether he has been there since she has been sleeping in the living room. Before my daughter was there we used the living room a lots of times when we had company. The couch was located right near the window; it's been there ever since I moved there."

J. A. Everett, a member of the Tarboro police force, testified:

"I am a member of the Tarboro police force. On the night of the shooting Mr. Wyatt and Mr. Hathaway came to the police station. As a result of their appearance at the station I went out to make an investigation. Mr. Walton was with me. Hathaway went with me. I did not know where to go. Hathaway directed us to Hart Mill, the new settlement over there, to Jim Cooke's home. I went to Jim Cook's home. This rifle was delivered to me by his wife. Jim was not at home. I started back to the station and went by one of the picket tents and I saw Jim there and I stopped. I know Jim Cook. I called him over to the car. He got in. I told Jim that Sheriff Bardin was down at the station and would like to talk to him in regard to some shooting and I asked him would he mind going down to the station and he said, 'No.' So I said get in, and we went down to the police station. I asked him had he been shooting his rifle, and he said no, that he hadn't shot it in several months. He did not make any further statement about it at that time.

"On two occasions I was present when he talked to Sheriff Bardin at the police station that same night. Matthews was not present this first time Cook talked to the Sheriff. He made the statement that he loaned his rifle to Matthews and Brock.

"He said nothing else in my presence at that particular time. A few minutes later he did, but not then. Sheriff Bardin had a war-

rant issued for Matthews and Brock at that time, and then there was a conversation with Cook, and then later Cook's name was put on the warrant and due to the warrant we went to Matthews' house and arrested him. I was not with Matthews when he was brought back to the station. Matthews made a statement at the county jail. Cook and Sheriff Bardin was present.

"The Sheriff told Cook, said, 'Go ahead and tell what you told me awhile ago.' Then Cook said, 'I was in the front seat on the right-hand side of the car and Matthews was driving and Brock was in the back seat and done the shooting.' Cook made that statement. He said his rifle was used. The Sheriff said to Matthews, 'What do you say about it?' and he said, 'That's right. That's what he says.' Cook said they were in Matthews' car."

Tom Bardin, Sheriff, testified:

"I went to J. D. Wyatt's home the night of the shooting before I talked to the two defendants. I examined the premises." He then identified various objects in photographs introduced in evidence by the State, purporting to illustrate the interior of Wyatt's home after the shooting occurred, pointing out the bullet holes in the walls and windows, and identifying bullets removed therefrom. He further testified: "I knew where Mr. Wyatt lived before that time. The front window to the highway is not over 30 or 40 feet. Probably 15 yards at the most. That is from the shoulder. The concrete portion might be a little bit further, but not much. I first saw Jim Cook at the police station after I returned from Mr. Wyatt's house. . . . When we first arrived at the police station Cook was sitting in there and Mr. Wyatt went in the hall of the City Hall with him, and I went out a few minutes later where Mr. Wyatt and Jim Cook were, and Mr. Wyatt had been talking with him. . . . Mr. Wyatt was talking to him and said, 'Jim, we know it was you. You had better come clean.' I told Cook, 'Now, let me tell you before you make any statement anything you say can be used for you or against you.' . . . He then stated that yes, it was his gun, that Elmer Matthews and David Brock had come to his house and borrowed it from him and brought it back later. I asked him if he had cleaned the gun and he said no, when they brought it back it had been cleaned . . . I was not there when Mr. Wyatt was talking to Jim Cook."

During the examination the jury was sent from the courtroom and the following occurred: J. D. Wyatt (recalled) testified, in the absence of the jury: "As to what conversation I had with Cook and what statement I made to him before he made any statement to me, it was just what

Sheriff Bardin testified to. That is all that was said. I did not say I would do everything I could if he would come clean."

The jury returned and the court proceeded with the taking of testimony, Bardin still on the stand:

"Q. Did Cook tell you that he did go with them Sheriff?

"A. At this time he did not.

"Q. Well, tell me without reference to any names what he said happened when you first talked to him at the police station.

"A. He stated that two men came to his house and borrowed his rifle and said they were going to get Mr. Wyatt. Said they later brought back his rifle. Then I questioned him as to its being clean, and he said they must have cleaned it, that he did not clean it. And, as a result of that information that he gave me, I called for a Justice of the Peace to come down, and Mr. Wyatt swore out warrants for two other parties.

"Q. Did you thereafter have a warrant delivered to you for Elmer Matthews?

"A. Yes, sir. I served it. Matthews was at home. He had gone to bed. I read the warrant to him, and he got up and put his clothes on and got in the car. I believe it was my car." (At this point the court instructed the jury not to consider the following testimony as to defendant Jim Cook: "I asked him, 'What in the world were you all thinking about?' and he said, 'I don't know.' I said, 'You were with the boys, weren't you?' He said, 'Yes.'")

"Q. As to the conversation with either Cook or Matthews, what happened next?

"A. Well, they were carried to the county jail, and all three of the defendants were in the hallway of the jail and I told Jim, 'All right, tell what happened.' Jim Cook, Elmer Matthews, Mr. Everett, Mr. Alderman, and the jailer were present. And I think another person came in before we were finished.

"Q. Did he call any names?

"A. They were all three together. He said they were all together and he stated, 'We went out to Mr. Wyatt's in Elmer Matthews' car and David Brock fired the bullets into the window.' I asked him, 'Whose gun was it?' and he said, 'It was my gun.' and he said it was Matthews' car, and I said, 'Who fired the bullets?' and he said, 'David Brock,' and I turned to Matthews and said, 'Is that right?' and he said, 'That's right.' I said, 'What did you say?' and he said, 'That's what he said.'"

"I examined the rifle that has been identified by Mr. Everett. It was freshly cleaned the night I examined it. I did not examine the magazine. I examined the chamber. There was fresh oil and burnt powder. I rubbed paper on it. That is the piece of paper that I used. Those markings are on there from wiping it. I rolled the paper up and rammed it up into the chamber. I brought it out and it was covered with fresh oil and burned powder. It is a .22-caliber rifle. It is an automatic. I don't know how many bullets it will hold. It will hold as many as five. I have examined the bullets closely enough to testify that they are .22 bullets. They are .22's. . . . The next day I was talking to Jim Cook and he made the statement that on the way out there to Wyatt's house one of the parties along was trying to find out if either one could shoot from the left shoulder, and neither one of them was left-handed, and since all of them shot from the right shoulder, they went down and turned around and came back and then shot into the house. He said he was seated on the front seat on the right-hand side. . . . Later on Matthews stated that he was driving the car and that he could not say who fired the gun. That David Brock and Jim Cook both were on the back seat and that the gun was fired from the back seat, but he did not know by whom. . . . Going from Tarboro to Wyatt's home the house would be on the right side of the road. I have known Mr. Wyatt three or four years. His general character and reputation is good. I have known Alton Hathaway personally just since this occurred. His general character and reputation is good." . . . "Later in the day, in questioning the boys, I asked them whether or not Howard Parker or Howard Harris had anything to do with it. I did not tell them I would let them go if they would tell what Harris or Parker had to do with it.

"In the conversation with Matthews and Cook, I told them they were in it and could not get out of it, but in my opinion they had been advised and that they were not fully responsible, and that I wanted to get whoever had been advising them before they got somebody else in trouble. I did not tell them that if they would talk I would go easy with them.

"In the course of questioning these boys I did not allow Mr. Wyatt to do part of the questioning. He was present right at the beginning. He was not present at any time after that. I don't recall that he did part of the questioning at the beginning. He and Cook went out in the hall and he talked to him for I wouldn't say over 60 seconds—a minute. And when I got there he made the statement to him, 'You had better come clean.' "

The State introduced in evidence the rifle mentioned in the testimony; paper identified as being used in rubbing oil and powder stains off the rifle; the bullets taken from the building. The State rested and each defendant moved for judgment of nonsuit, which was declined, and each of them excepted.

The defendants then moved for a verdict of not guilty as to the charge of a secret assault, and the motion was denied. Defendants objected. Each defendant moved "for judgment of nonsuit as to the charge of felonious secret assault." The motion was denied. Defendants object to the following instruction to the jury, the exceptive matter included in parenthesis:

> ("The statute under which this indictment was drawn, requiring the State to prove that there was not only an assault made in a secret manner with intent to kill, but that there was likewise a battery, and battery meaning the application of some force to the person of the one assaulted in law, the Court being of the opinion that in this case there is not sufficient evidence of a battery as to any of the occupants of the dwelling of Mr. Wyatt to justify the case being sent to the jury and considered by the jury on the charge of the secret assault with intent to kill, the Court has granted the motion for nonsuit on the charge of the felonious assault (1) and will submit to the jury the question of guilt or innocence of the defendants on the charge of an assault with a deadly weapon upon Barbara Jean Hathaway, Alton Hathaway and Ola Mae Hathaway, the occupants of the room into which it is alleged the shots that have been referred to in the evidence were fired.")

The evidence was submitted to the jury and after deliberation the jury returned and the following occurred:

> "Upon the coming in of the jury the Clerk inquired of the jury if they had agreed upon a verdict, and the foreman, speaking for the jury, replied, 'Yes.' The Clerk then inquired, 'How say you, do you find the defendant Elmer Matthews guilty or not guilty?' To which the foreman of the jury replied, 'Guilty.' The Clerk then inquired, 'Do you find the defendant Jim Cook guilty or not guilty?' and the jury replied, 'Guilty,' and the Clerk then said, 'So say you all?' and the jury replied, 'Yes.' The Court then made inquiry of the jury in the following language: 'Do you find the defendants guilty of an assault with a deadly weapon?' to which the foreman of the jury replied. 'Yes. Guilty of aiding and abetting.' "

Thereupon the court gave to the jury the following instruction, to which the defendants filed exception:

"Gentlemen, the Court again instructs you that an aider and abettor in the commission of the crime of an assault with a deadly weapon, if he be present and actively by overt acts, aids and abets the one who commits the crime is guilty of the offense of an assault with a deadly weapon, that is to say, that aiders and abettors in misdemeanors are guilty as principals and the Court again instructs you that if the State has satisfied the jury beyond a reasonable doubt that the defendants were present at the time a third person by the name of Brock committed an assault with a deadly weapon upon the occupants of the front room in said home of the witness Wyatt, to wit, Barbara Jean Hathaway, Alton Hathaway and Ola Mae Hathaway, and the State has further satisfied you beyond a reasonable doubt that the said Brock did intentionally shoot rifle bullets into the bedroom of the said Barbara Jean Hathaway, Alton Hathaway and Ola Mae Hathaway in the nighttime while the said Barbara Jean Hathaway, Alton Hathaway and Ola Mae Hathaway were occupying said bedroom, and that the said Brock fired said bullets into said bedroom in a manner that was likely to cause injury to the occupants of said room or any of them and in the manner so as to cause them or any of them to have to move from a place where they had a right to be as a result of being frightened from such shooting and has further satisfied you beyond a reasonable doubt that the defendants were present and actively aiding and abetting the said Brock in the commission of said offense, that is in the commission of the shooting of the rifle bullets which the Court has just referred to, then and in that event it would be your duty to return a verdict of guilty of assault with a deadly weapon as to each of said defendants.

"If the State has failed to so satisfy you of those facts beyond a reasonable doubt, it would be your duty to return a verdict of not guilty, and the Court again instructs you that you may return a verdict of guilty of assault with a deadly weapon as to both of the defendants, or you may return a verdict of guilty of assault with a deadly weapon as to either of them and not guilty as to the other, or you may return a verdict of not guilty as to both of them, depending upon how you find the facts to be."

The jury retired for further deliberation. The defendants moved that they be discharged on the basis of the verdict just brought in by the jury

and the motion was declined. Defendants excepted. The jury returned to the courtroom and the following occurred:

> "The Clerk inquired of the jury as follows: 'Gentlemen have you agreed upon the verdict?' Whereupon the foreman answered, 'Yes.' And the Clerk inquired: 'Do you find the defendant Elmer Matthews guilty or not guilty?' Whereupon the foreman answered: 'Guilty.' 'Do you find the defendant Jim Cook guilty or not guilty?' Whereupon the foreman answered: 'Guilty.' The Court then inquired: 'Do you find the defendant Elmer Matthews guilty of assault with a deadly weapon or not guilty?' Whereupon the foreman replied: 'Guilty.' The Court inquired of the jury: 'Do you find the defendant Jim Cook guilty of assault with a deadly weapon or not guilty?' Whereupon the foreman replied: 'Guilty.'"

The defendants renewed their motion for discharge, which was denied, and defendants excepted.

Defendants then moved that the verdict be set aside and this was declined. They then moved that a mistrial be declared and that they be allowed a new trial. Motion denied, and defendants excepted. The defendants each moved in arrest of judgment. The motion was denied, and the defendants excepted.

Judgment thereupon followed the verdict, assigning to each defendant, Elmer Matthews and Jim Cook, two years confinement in jail to work under the supervision of the State Highway and Public Works Commission. Each defendant objected, and excepted, and appealed.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Robert S. Cahoon for defendants, appellants.

SEAWELL, J. The record on appeal is voluminous and contains a multitude of exceptions. These required and have received careful consideration but space forbids elaboration here.

The phases of the trial most stressed in the appellants' brief and oral argument, and in which they find the more serious challenge to its validity, will be discussed.

1. The theory that defendants were entitled to a discharge as upon acquittal as grounded in the motions in arrest of judgment and similar motions affecting the verdict, has neither technical nor substantial merit. The theory is that there was only one charge against them,—that of felonious secret assault,—and the manner in which the court dealt with

it had the effect of nonsuiting the State thereon, which, under the statute operates as an acquittal, G.S. 15-173.

Consonant with the practice here we regard the effect of the action taken by the court as simply withdrawing from the consideration of the jury the more aggravating and more serious elements of the offense charged, leaving to their consideration the lesser crime or degree of the offense. This, within the frame of the case presented, was favorable to the defendants, and certainly within the law and approved practice. Without it, it would still have been competent for the jury to convict the defendants of a lesser degree of crime charged. G.S. 15-169, 170; *S. v. Jackson,* 199 N.C. 321, 154 S.E. 402; *S. v. Williams,* 185 N.C. 685, 116 S.E. 736; *S. v. High,* 215 N.C. 244, 1 S.E. 2d 563; *S. v. Jones,* 222 N.C. 37, 38, 21 S.E. 2d 812; *S. v. Bentley,* 223 N.C. 563, 27 S.E. 2d 738; *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *S. v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648.

The withdrawal of the more aggravated charge from consideration by the jury and submission of the less aggravated phase of the offense was within the discretion of the trial judge.

Closely parallel with the foregoing subject was the exception taken to the fact that the trial judge did not receive the verdict of the jury as first tendered, in response to the formal question of the court as to how they had found. In it they found both defendants guilty, answering, "Yes, guilty of aiding and abetting," but the judge sent the jury back for further deliberation after further instructing them as to the significance of aiding and abetting while present.

The answer to this objection may be found in *S. v. Perry,* 225 N.C. 174, 33 S.E. 2d 869, loc. cit., 176:

> "When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict. *S. v. Arrington,* 7 N.C. 571; *S. v. McKay,* 150 N.C. 813, 63 S.E. 1059; *S. v. Bazemore, supra* (193 N.C. 336); *S. v. Noland,* 204 N.C. 329, 168 S.E. 412; *Queen v. DeHart,* 209 N.C. 414, 184 S.E. 7."

See also *S. v. Wilson,* 218 N.C. 556, 11 S.E. 2d 567.

The conclusion to which the jury had come was not materially changed by their further consideration. *S. v. Forshee,* 228 N.C. 268, 45 S.E. 2d 372; *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620.

The instruction given was called for by the evidence that tended to show that the defendants acted in concert. *S. v. Gibson,* 226 N.C. 194,

37 S.E. 2d 316; among other things accommodating the person chosen to do the shooting by jockeying the car so that upon its return the shot could be fired out of the right window by a right-handed person.

Defendants were tried for an assault with a deadly weapon and no special evidence was required beyond the intent to commit the unlawful act, and this will be inferred or presumed from the act itself. 1 McClain's Criminal Law, secs. 239, 240.

2. The appellants urge that the confessions made by these defendants were involuntary and should have been denied admission in evidence. There is no suggestion that either of them was coerced, threatened, subjected to torture, physical or mental, worn down by repeated questioning, or otherwise mistreated in order to produce a confession as the purchase price of surcease from pain or weariness. The contention is that there was some implied promise, or at least hope held out in the conversation between Wyatt and Cook that the defendant would be treated more leniently. Wyatt had said, "Jim, we know it was you. You had better come clean." There was no further inducement.

As careful as this Court has always been to see that incriminating statements made by persons accused of crime are in fact and in deed voluntary before admitting them in evidence, free from the influence of promise or undue persuasion, and fully recognizing that necessity, we are unable to class the remarks made by Wyatt to his nephew Cook in any of the objectionable categories.

The evidence discloses that Wyatt went to talk with Cook on his own initiative without any evidence that he went, as contended by appellants, with official procurement. He does not appear to have been an emissary, stooge or *agent provocateur* of the officials. However, the sheriff was present during part of the conversation and this must be given due consideration. The sheriff also warned him that what he said could be used as evidence for him or against him, and this warning, while not required in this State, (*S. v. Dixon,* 215 N.C. 438, 2 S.E. 2d 371; *S. v. Grier,* 203 N.C. 586, 166 S.E. 595), has been uniformly considered as bearing on the voluntariness of the statement.

Matthews, when first arrested was asked by Sheriff Bardin: "What in the world were you thinking about?" And Matthews replied, "I don't know." The sheriff then said, "You were with the boys, weren't you?" And Matthews replied, "Yes."

Later, at the jail, all three of the defendants being present, Cook was asked to tell what happened and gave a detailed account of the affair, stating that "we went out to Mr. Wyatt's house in Elmer Matthews' car and David Brock fired the bullets." Matthews, upon a simple question by the sheriff, admitted the correctness of the statement. Later on Matthews stated that he was driving the car and Brock and Cook were

in the back seat; that the gun was fired from the back seat but that he did not know who fired it. Since Matthews, without persuasion or inducement, admitted the correctness of Cook's statement, he was not privy to any constitutional immunity which counsel for appellants can claim for Cook; and his objection to the admission of the evidence is untenable.

The card-index method of determining the case before us would be a poor substitute for reason, and a sense of justice both to the public and the men accused of crime. The Court is always happy to find and follow well reasoned precedent, but must in each instance be guided by its own reason and sense of right on a study of the facts before it, since, because of their infinite variety, every case must stand on its own bottom. In appraising the significance of the interchange between Wyatt and Cook, supposed to have elicited the self-incriminating statement, it is logical to assume that the reaction is normal to the stimulus; emotionally responsive to the appeal. There is nothing in Wyatt's exhortation to "come clean" that should incite fear or inspire hope in the normal mind, —neither threat nor promise. It appears to be an appeal to conscience, which every person, not completely amoral, has in some degree; or to that indefinable urge to square himself with the truth which experience has shown is often an incentive to confession in the most abandoned.

The subject is one of repeated occurrence in our Reports and the following cases will be found apposite to the decision: *S. v. Thompson, supra; S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *S. v. Grass,* 223 N.C. 31, 25 S.E. 2d 193; *S. v. Oxendine, supra; S. v. Caldwell,* 212 N.C. 484, 193 S.E. 716; *S. v. Bohannon,* 142 N.C. 695, 55 S.E. 797; *S. v. Moore,* 210 N.C. 686, 188 S.E. 421; *S. v. Myers,* 202 N.C. 351, 162 S.E. 764; *S. v. Harrison,* 115 N.C. 706, 20 S.E. 175.

In the *Thompson case, supra,* will be found a critical and comprehensive analysis of the whole subject, with pointed analogy to the instant case; in that case the Court held: that a statement to a defendant, "it would be better to go on and tell us the truth than try to lie about it . . .; it would be better to come on and tell the truth," did not amount to a threat or promise. The expression used by Wyatt, of like character and import, but much milder in expression, did not contain either threat or promise affecting the voluntariness of his confession.

We have not thought it necessary to note all the exceptions to the evidence in the foregoing statement of the case in the order in which they were made, but have given the defendants the benefit of every one of them as made in our study and consideration of the case and do not find prejudicial error. The court below was careful to distinguish where the evidence was competent against one of the defendants and not against the other, and so instructed the jury. And we do not find in this phase of the exceptions any reason to interfere with the result of the trial.

Objections to the instructions given the jury not here noted have also been carefully examined and we do not find them meritorious.

We find no error in the trial.

No error.

J. C. CARSON v. PINK DOGGETT
and
WESLEY WARD v. PINK DOGGETT.

(Filed 29 March, 1950.)

1. Trial § 22a—

On motion to nonsuit, the evidence will be considered in the light most favorable to plaintiff.

2. Trial § 22b—

Defendant's evidence in conflict with that of plaintiff will not be considered on motion to nonsuit.

3. Malicious Prosecution § 10—

Evidence *held* sufficient to overrule nonsuit in this action for malicious prosecution.

4. Malicious Prosecution § 1a—

In order to constitute an action for malicious prosecution there must be (1) the institution or the procurement of the institution of criminal proceedings, (2) without probable cause, (3) with malice, and (4) termination of the prosecution in plaintiff's favor.

5. Malicious Prosecution § 3—

Probable cause is the existence of facts and circumstances sufficient to induce a reasonably prudent man to believe the person charged is guilty of the offense, the criterion being apparent guilt as contra-distinguished from real guilt, and is a question of law for the court when the facts are admitted or established.

6. Same—

The acquittal of the person charged does not make out a *prima facie* case of want of probable cause.

7. Malicious Prosecution § 11—

An instruction merely defining probable cause is insufficient, it being required that the court charge the jury that if the jury should find certain facts by the greater weight of the evidence, whether such facts would or would not constitute probable cause.

8. Malicious Prosecution § 10—

A motion for judgment as of nonsuit in an action for malicious prosecution challenges the validity of the warrant upon which the plaintiff was prosecuted, since if the warrant be invalid the action will not lie.

9. Indictment and Warrant § 10—

A warrant must sufficiently identify the person accused, Fourth Amendment to the Constitution of the U. S., Constitution of N. C., Art. I, Sec. 15, G.S. 15-19, G.S. 15-20.

10. Indictment and Warrant § 15—

Our courts have authority to amend warrants defective in form, and even in substance, provided the amendment does not change the nature of the offense charged in the original warrant. G.S. 7-149 (12).

11. Malicious Prosecution § 10—

The evidence tended to show that the warrant named a specified person, that another person, whom the accuser intended to have arrested, was arrested thereunder, and that after arrest the name of the person arrested was substituted for the name originally appearing in the warrant. There was no evidence that the name of the party to be arrested was unknown, and no question of inadvertence or amendment. *Held:* The evidence tends to make out a cause of action for false imprisonment rather than malicious prosecution, and defendant's motion to nonsuit the action for malicious prosecution should have been allowed.

APPEAL by defendant from *Pless, J.*, at September Term, 1949, of MCDOWELL.

These are actions brought by the plaintiffs Carson and Ward against the defendant Doggett, to recover damages for malicious prosecution of the plaintiffs by the defendant on a charge of larceny. The cases were consolidated for trial by order of the trial judge.

The evidence tends to show that the defendant purchased a large pile of slabs for $50.00. The slabs were located in an isolated section of McDowell County, known as Bracket Town. James Williams, the owner of a truck, and J. C. Carson and Wesley Ward, drove over to Bracket Town on 27 February, 1948, to get a load of these slabs. Carson had gone with Williams to Bracket Town on prior occasions to get slabs, but Ward was accompanying them for the first time. Williams, who owned and operated the truck, picked up Ward on the street in Marion on his way to Bracket Town. Ward was a regular employee of the Southern Railway Company and had been for fifteen years, but he also helped Williams with his hauling from time to time, as did Carson.

On the occasion in question, when Williams, Carson and Ward arrived at or near the pile of slabs in Bracket Town, according to the testimony of Ward, the defendant Pink Doggett drove up and "asked Williams how many loads of slabs he had hauled, and Williams said he hauled one before the snow and two at the time of the snow. Williams asked Pink what he got for a load and Pink said $5.00. Pink said, 'Who gave you permission to get those slabs?' and Williams said, 'Walter Upton,' and Pink said, 'Let's go to see him.' They went on up and called Walter Upton, and Pink said, 'Did you give this white fellow permission to get

those slabs?' and Upton said, 'Yes, I didn't think there would be any harm in it.'"

Upton, as a witness for the defendant, denied that he told Williams he could get any of the slabs that belonged to Pink Doggett.

The defendant testified, the white gentleman, Mr. Williams, offered to pay $5.00 a load for the slabs, and offered to pay $5.00 then and the balance on Tuesday. He said, "No, I'll just wait. . . . I saw it was a stealing case and I hadn't any authority to settle a case like it."

The plaintiffs and the defendant are colored men. At no time, according to the plaintiffs' evidence, during the conversation between Williams, the owner of the truck, and the defendant Doggett, or during the conversation with Upton, did anyone ask these plaintiffs anything about the slabs, and they made no statement about them. The defendant, however, testified that Carson admitted helping Williams "move every load and also that he hauled some slabs when Mr. Williams wasn't along." But, on cross-examination, the defendant admitted that he did not have a scintilla of evidence that Wesley Ward got any slabs. No slabs were taken on 27 February, 1948.

The defendant had warrants issued on 27 February, 1948, charging the plaintiff J. C. Carson and Harrison Long with the larceny of slabs belonging to him, valued at more than Fifty Dollars. However, Wesley Ward, not Harrison Long, was arrested on the warrant issued against Long. Carson and Ward were kept in jail five days, and then released on bond. Both defendants (the plaintiffs in these cases) were acquitted of the charge of larceny in the McDowell County Criminal Court, 9 March, 1948.

During the trial on these warrants, according to the defendant's evidence, the trial judge suggested that he be paid $15.00 for the three loads of slabs. This amount was paid into court and turned over to him with the approval of the court. But there is no evidence on the record that would indicate that either of these plaintiffs paid the $15.00 or any part thereof.

The warrant offered in evidence as plaintiffs' Exhibit No. 1, purporting to be issued against Wesley Ward, was not issued against him at the time of its execution. The defendant testified that he did not know the name of Wesley Ward at the time he applied for the warrant, but "we got it later." It does not appear from the evidence when Wesley Ward's name was inserted. It does appear that the warrant was originally drawn against Harrison Long, which name, according to the record, has a mark drawn through it where his name appears as the defendant and also where it appears in the affidavit, and Wesley Ward's name was inserted in both places, but the order of arrest, that is the warrant, does not, and never has, contained the name of Wesley Ward; instead, it is

directed to any lawful officer of McDowell County to arrest Harrison Long, and him safely keep, so that he might be brought before the officer issuing the warrant, to answer the complaint therein set forth.

From the verdicts in favor of the plaintiffs and the judgments entered pursuant thereto, the defendant appeals and assigns error.

Roy W. Davis for plaintiffs.

Stover Dunagan and Proctor & Dameron for defendant.

DENNY, J. The defendant assigns as error the refusal of the court below to grant his motion for judgment as of nonsuit in each case. The cases will be considered separately.

APPEAL IN THE CASE OF CARSON v. DOGGETT.

We think the evidence introduced in the trial below, when considered in the light most favorable to plaintiff, as it must be on motion for judgment as of nonsuit, is sufficient to withstand such motion. *Potter v. Supply Co.*, 230 N.C. 1, 52 S.E. 2d 908; *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251; *Grier v. Phillips*, 230 N.C. 672, 55 S.E. 2d 485. Moreover, defendant's evidence in conflict with the evidence of the plaintiff will not be considered on motion to nonsuit. *Chesser v. McCall*, 230 N.C. 119, 52 S.E. 2d 231; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Taylor v. Hodge*, 229 N.C. 558, 50 S.E. 2d 307.

The 5th exception and assignment of error is to the failure of the court to state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon, in that the court failed "to state and explain to the jury what facts, if found to be true by the greater weight of the evidence, would constitute probable cause for indicting and prosecuting each of the plaintiffs."

In order to establish his cause of action for malicious prosecution, the plaintiff must prove: (1) That the defendant instituted or procured the institution of the criminal proceeding against him; (2) that the prosecution was without probable cause; (3) that it was with malice; and (4) that it was terminated in his favor. *Mooney v. Mull*, 216 N.C. 410, 5 S.E. 2d 122; *Perry v. Hurdle*, 229 N.C. 216, 49 S.E. 2d 400; *Alexander v. Lindsey*, 230 N.C. 663, 55 S.E. 2d 470.

In the trial below, "probable cause" was defined as meaning "that the action was instituted without sufficient knowledge and information on the part of the defendant as would cause him or any other reasonably prudent person to believe the plaintiff to be guilty of the offense charged."

In an action for malicious prosecution, it is the duty of the judge to go further than to define probable cause, leaving the jury to determine

what facts do or do not constitute probable cause. He must instruct the jury as to what facts, if found by it from the evidence, will show that there was or was not probable cause. *Wilkinson v. Wilkinson,* 159 N.C. 265, 74 S.E. 740. In the last cited case, *Walker, J.,* in speaking for the Court, quoted with approval the definition of probable cause as given in *Smith v. Deaver,* 49 N.C. 513, as: "The existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty was guilty. It is a case of apparent guilt as contra-distinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time, as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution; not that he knows the facts necessary to insure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense."

In *Smith v. Deaver, supra,* the Court also said: "What is probable cause is a question of law, to be decided by the court upon the facts, as may be found by the jury." Likewise, when the facts are admitted or established, the question of probable cause is one of law for the court. *Rawls v. Bennett,* 221 N.C. 127, 19 S.E. 2d 126; *Morgan v. Stewart,* 144 N.C. 424, 57 S.E. 149. It is also well to keep in mind that in an action for malicious prosecution, the acquittal of the defendant by a court of competent jurisdiction does not make out a *prima facie* case of want of probable cause. *Morgan v. Stewart, supra.*

Consequently, the defendant was entitled to have the court instruct the jury that if upon the question of probable cause, the jury should find certain facts from the evidence, and by its greater weight, whether such facts would or would not constitute probable cause. *Beale v. Roberson,* 29 N.C. 280; *Vickers v. Logan,* 44 N.C. 393; *Jones v. Railroad,* 125 N.C. 227, 34 S.E. 398; *Wilkinson v. Wilkinson, supra; Humphries v. Edwards,* 164 N.C. 154, 80 S.E. 165; *Tyler v. Mahoney,* 166 N.C. 509, 82 S.E. 870.

We think the exception to the charge is well taken and must be sustained.

The defendant is entitled to a new trial on this appeal, and it is so ordered.

APPEAL IN THE CASE OF WARD *v.* DOGGETT.

The motion for judgment as of nonsuit, interposed below, was properly overruled, if the warrant on which the plaintiff was arrested and tried in the McDowell County Criminal Court was a valid warrant, otherwise not.

The validity of the warrant on which Wesley Ward was arrested and imprisoned is challenged by the motion for nonsuit as well as by the exception to the following portion of the charge:

"There is one matter, gentlemen of the jury, that the Court wishes to clear up by a simple statement of the law, and that is, gentlemen, it appeared from the warrant issued in the *Ward case* that although the affidavit upon which the warrant was based charging the defendant Ward with the crime of larceny, that the actual warrant itself did not have his name on it but had the name of some third person on it, but it further appeared that the plaintiff was arrested on that warrant, even though the name of another person appeared on it. The Court instructs you, gentlemen of the jury, that if the name of some other person was inadvertently inserted in the warrant by the magistrate when it was intended that the name of the plaintiff should have been inserted in it, and that the plaintiff Ward was arrested upon that warrant, even though that was not his name, the Court instructs you that would not absolve the defendant Doggett in this case from responsibility. I do not mean by that to say that means you should answer this first issue YES, but I do mean to say that if you find the situation existed as I have just referred to it, that you would treat the matter in the same manner as if the proper name, that of the plaintiff Ward, had been inserted in the warrant instead of that of a third person."

The real question presented for decision is whether the evidence on this record makes out a case of malicious prosecution or one of false imprisonment. The answer turns upon whether the warrant upon which Wesley Ward was arrested was valid or invalid.

According to the evidence of the present defendant, Pink Doggett, he did not know the name of Wesley Ward at the time he procured the warrant against Harrison Long for stealing his slabs. He further testified: "I intended to write a warrant against Wesley Ward and I did cause this paper (plaintiffs' Exhibit No. 1) to be issued by the magistrate, and I swore to it and signed it. . . . When I swore to this warrant, I gave it to the officer . . . Wesley Ward is the man I intended to have arrested, . . . and I got him put in jail, . . . and he was found not guilty by the judge."

There is no evidence on this record to the effect that Wesley Ward was known as Harrison Long. Neither was there anything in the original affidavit or the warrant to indicate that the name of the party to be arrested was unknown. Likewise there was no evidence offered in the trial below to indicate that the name of Harrison Long was inserted in the affidavit or the warrant through inadvertence. Neither did the warrant when issued and turned over to the officer to be served, contain any description by name or otherwise of Wesley Ward. The evidence

does not disclose who inserted Wesley Ward's name in the affidavit or when it was inserted or by what authority.

The Fourth Amendment to the Constitution of the United States declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." And our statutes, G.S. 15-19 and 20, authorize the issuance of a warrant by a proper judicial officer only after the examination of the complainant and any of his witnesses on oath, and "if it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant, . . . reciting the accusation, and commanding the officer to whom it is directed forthwith to take the person accused of having committed the offense, and bring him before the magistrate, to be dealt with according to law."

In the case of *West v. Cabell,* 153 U.S. 78, 38 L. Ed. 643, the warrant had been issued for the arrest of "James West" and not otherwise designating or describing the person to be arrested, charging James West with murder. The person arrested was Vandy M. West. Evidence was permitted to be introduced, over plaintiff's objection, to the effect that Vandy M. West was the party for whose arrest the warrant was intended; and the jury was instructed that "if they believed that the plaintiff was the man for whose arrest the commissioner issued the warrant, the defendants were not liable for damages on account of the mere fact of arrest." But the Court said: "By the common law, a warrant for the arrest of a person charged with a crime must truly name him, or describe him sufficiently to identify him. . . . The principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in American constitutions; and by the great weight of authority in this country a warrant that does not do so will not justify the officer making the arrest. . . . The effect of the rulings and instructions of the court was to give the jury to understand that the private intention of the magistrate was a sufficient substitute for the constitutional requirement of a particular description in the warrant. For this reason, the judgment is reversed and the case remanded" and a new trial was granted. 22 Am. Jur., False Imprisonment, Sec. 73, p. 405; *Duffy v. Keville,* 16 Fed. Rep. 2d 828; Const. of North Carolina, Art. 1, Sec. 15; *Brewer v. Wynne,* 163 N.C. 319, 79 S.E. 629.

In the instant case, there was no objection to the testimony of Pink Doggett to the effect that he got the man arrested he intended to get, but

his counsel do challenge the correctness of the court's instruction to the jury in this respect.

Under our practice, our courts have the authority to amend warrants defective in form and even in substance; provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. G.S. 7-149, Rule 12; *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470; *S. v. Brown,* 225 N.C. 22, 33 S.E. 2d 127; *S. v. Mills,* 181 N.C. 530, 160 S.E. 677; *S. v. Poythress,* 174 N.C. 809, 93 S.E. 919; *S. v. Telfair,* 130 N.C. 645, 40 S.E. 976; *S. v. Smith,* 103 N.C. 410, 9 S.E. 200. But we are not dealing with an amended warrant or a motion to amend. We must take the record as presented and say whether or not in the face of defendant's challenge to the sufficiency of the evidence, the plaintiff has made out a case of malicious prosecution. It is unfortunate that the pleadings were not so cast as to allege a cause of action for malicious prosecution and for false imprisonment. *Caudle v. Benbow,* 228 N.C. 282, 45 S.E. 2d 361; *Rhodes v. Collins,* 198 N.C. 23, 150 S.E. 492. However, on the facts presented, we do not think the plaintiff makes out a case of malicious prosecution, but he does make out one of false imprisonment. *Caudle v. Benbow, supra; Rhodes v. Collins, supra; McCaskey v. Garrett,* 91 Mo. 354.

The motion of nonsuit should have been sustained in this case.

In the case of *Carson v. Doggett*—New trial.

In the case of *Ward v. Doggett*—Reversed.

W. L. STEELE, JR., v. LOCKE COTTON MILLS COMPANY, A CORPORATION, AND JOHN W. CLARK, W. H. BELK, SR., IRWIN BELK, W. CLARK ERWIN, THORNE CLARK, DAVID CLARK AND W. A. HANGER.

(Filed 29 March, 1950.)

1. Corporations § 16—

In order to be entitled to *mandamus* to compel the declaration of dividends by a corporation, plaintiff stockholder must allege that the corporation has a surplus or net profits available for the payment of such dividends at the time the action is brought and the application for the writ is made.

2. Same—

The directors of a corporation are under legal duty to pay the whole of the accumulated profits in dividends subject to the limitation that neither the corporation's capital stock nor its working capital may be impaired. G.S. 55-115, G.S. 55-116.

3. Mandamus § 1—

Mandamus will not lie to redress a past legal wrong or to prevent a future legal injury, but lies solely at the instance of a person having a present legal right to demand the performance of a clear legal duty resting upon the party to be coerced by reason of his official status or by operation of law.

4. Same—

The duty of the party to be coerced must exist at the time suit for *mandamus* is begun and at the time application for the writ is made, since loss of a once-existing right, even during the pendency of the action, precludes the issuance of the writ.

5. Corporations § 16—

Allegation that defendant corporation, on a date specified, had undivided profits in a specified amount available for the payment of dividends, is insufficient to establish the existence of such sum on the date of the institution of the action, more than nine months after the date specified, and therefore is insufficient predicate for *mandamus* to compel the directors to declare a dividend.

6. Pleadings § 15—

The rule that a pleading will be liberally construed upon demurrer and the pleader given the benefit of all facts that can be implied by fair and reasonable intendment from the facts expressly stated, cannot be invoked to supply an essential fact by inference when the facts specifically averred permit the deduction of an opposite inference.

APPEAL by defendants from *Phillips, J.,* in Chambers on 15 December, 1949, in action pending in the Superior Court of GUILFORD.

Civil action to enforce declaration and payment of dividend by business corporation.

The case made out by the complaint is summarized in the next paragraph.

The defendant, Locke Cotton Mills Company, is a business corporation organized under the laws of North Carolina, and has a board of directors consisting of the defendants, Irwin Belk, W. H. Belk, Sr., David Clark, John W. Clark, Thorne Clark, W. Clark Erwin, and W. A. Hanger. The plaintiff, W. L. Steele, Jr., is the registered holder of 24 of the 5,000 shares of preferred stock issued by the corporation. Each share of the preferred stock is of the par value of $100.00, and contains this stipulation as to dividends: "The registered holders of . . . the preferred stock . . . shall be entitled to receive, and this company shall be bound to pay a fixed annual dividend of eight per cent cumulative, to date from January 1, 1909, payable in equal installments on the first day of January and the first day of July in each year out of the net earnings of the

company and to be paid in dividends in that year before any dividends can or shall be paid upon the common stock; if in any year all of the said dividends upon . . . the preferred stock shall not be fully paid, then the amount thereof unpaid shall be and remain a charge . . . upon the net earnings of future years to be paid before any dividends can or shall be declared and paid upon the common stock." No dividends have been paid on the preferred stock since 1930. "On January 1, 1949, there were undivided profits in the defendant corporation in the sum of $81,604.22 available for the payment of dividends," but the directors did not declare any dividend on the preferred stock payable out of such accumulated profits. On 5 September, 1949, the plaintiff made demand upon the directors for the declaration and payment of dividends on the preferred stock equal to the amount of the accumulated profits on hand on 1 January, 1949. The directors refused to comply with the demand, and on 11 October, 1949, the plaintiff brought this action, praying "that the court order that a writ of *mandamus* issue commanding the individual defendants to declare as a dividend to the cumulative preferred stockholders the sum of $81,604.22."

The defendants demurred, asserting that the complaint does not state facts sufficient to constitute a cause of action against them "in that the complaint fails to allege that there are now or were at the time of the institution of this action net profits or surplus profits arising from the business of the corporate defendant from which a dividend may be declared under G.S. 55-116."

The court rendered judgment overruling the demurrer, and the defendants excepted and appealed.

Carroll & Steele for plaintiff, appellee.

Hartsell & Hartsell for defendants, appellants.

ERVIN, J. It is a basic rule of pleading that a complaint must allege every material fact necessary to sustain the right of the plaintiff to the relief which he seeks. *Potter v. Supply Co.*, 230 N.C. 1, 51 S.E. 2d 908. In consequence, we confront this primary question at the threshold of this appeal: Where a stockholder applies for a writ of *mandamus* to compel the directors of a corporation to declare and pay a dividend, must he allege in his complaint that the corporation has surplus or net profits available for the payment of such dividend at the time when the action is brought and the application for the writ is made?

The solution of this problem is to be found in the legal principles relating to the declaration and payment of corporate dividends, and governing the issuance of writs of *mandamus*.

G.S. 55-116 expressly provides that "no corporation may declare and pay dividends except from the surplus or net profits arising from its business." The method of determining what constitutes surplus or net profits available for dividends is prescribed by G.S. 55-115, which reads as follows: "The directors of every corporation created under this chapter shall, in January of each year, unless some specific time for that purpose is fixed in its charter, or by-laws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand. The corporation may, in its certificate of incorporation or by-laws, give the directors power to fix the amount to be reserved as a working capital."

These statutes establish these propositions: (1) That where the accumulated profits of a corporation have been ascertained in conformity with G.S. 55-115, a legal duty devolves upon the directors to declare a dividend among the stockholders of the whole of the accumulated profits and to pay the same to the stockholders on demand, *Amick v. Coble,* 222 N.C. 491, 23 S.E. 2d 854; *Cannon v. Mills Co.,* 195 N.C. 119, 141 S.E. 344; and (2) that neither the capital stock of a corporation, paid in and outstanding, nor its working capital, as fixed pursuant to the provisions of G.S. 55-115, may be impaired by the payment of a dividend under any circumstances. *Cannon v. Mills Co., supra.*

It is not the office of *mandamus* to redress a past legal wrong, or to prevent a future legal injury. The writ of *mandamus* is a command issuing from a court of competent jurisdiction, directed to some board, corporation, inferior court, officer, or person, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom it is directed, or from operation of law. *Hickory v. Catawba County,* 206 N.C. 165, 173 S.E. 56; 34 Am. Jur., Mandamus, section 2; 55 C.J.S., Mandamus, sec. 1.

Mandamus will not lie unless the party seeking the writ has a clear legal right to the performance of the act sought to be enforced, and the party to be coerced is under a positive legal obligation to do what he is asked to be made to do. *Ingle v. Board of Elections,* 226 N.C. 454, 38 S.E. 2d 566; *Warren v. Maxwell,* 223 N.C. 604, 27 S.E. 2d 721; *Raleigh v. Public School System,* 223 N.C. 316, 26 S.E. 2d 591; *Poole v. Board of Examiners,* 221 N.C. 199, 19 S.E. 2d 635. Hence, it is well settled that a plaintiff, who seeks relief by way of *mandamus,* must show that he has a *present clear legal right* to the thing claimed, and that it is the duty of the defendant to render it to him. *Lyon v. Commissioners,* 120 N.C.

238, 26 S.E. 929; *Brown v. Turner,* 70 N.C. 93. The right of the plaintiff and the duty of the defendant must exist at the time when the application for the writ is made. *United States v. Lamont,* 155 U.S. 303, 15 S. Ct. 97, 39 L. Ed. 160; *Frankel v. Woodrough,* 7 F. 2d 796; *Christ v. Superior Court in and for City and County of San Francisco,* 211 Cal. 593, 296 P. 612; *State ex rel. Walker v. Best,* 121 Fla. 304, 163 So. 696; *Kavanaugh v. Chandler,* 255 Ky. 182, 72 S.W. 2d 1003; *Dorsey v. Ennis,* 167 Md. 444, 175 A. 192; *State ex rel. McHose v. District Court of Fourteenth Judicial District in and for Golden Valley County,* 95 Mont. 230, 26 P. 2d 345; *State ex rel. Cashman v. Carmean,* 138 Neb. 819, 295 N.W. 801; *Washington Ass'n of New Jersey v. Middleton,* 11 N. J. Misc. 277, 165 A. 423; *State ex rel. Hamilton v. Cohn,* 1 Wash. 2d 54, 95 P. 2d 38; *State v. Newby,* 169 Wisc. 208, 171 N.W. 953; *State v. Waggenson,* 140 Wis. 265, 122 N.W. 726, 133 Am. S. R. 1075. If a plaintiff loses a once-existing right to invoke the remedy of *mandamus* for any reason before the writ is granted, the writ must be denied. *State ex rel. Cary v. Cochran,* 138 Neb. 163, 292 N.W. 239; *People v. Kaplan,* 117 Misc. 257, 192 N.Y.S. 105; *State v. Miller* (Tenn.), 1 Lea 596. This is so even though the loss of the right occurs during the pendency of the action, *Betts v. Raleigh,* 142 N.C. 229, 55 S.E. 145; *Colvard v. Commissioners,* 95 N.C. 515; or is due to the fault of the party against whom the writ is sought. *People v. Kaplan, supra.*

These things being true, it is obligatory for a plaintiff, who seeks a *mandamus* to compel a defendant to perform an alleged duty, to allege in his complaint all facts necessary to show that the plaintiff has a clear legal right to the performance of the particular duty at the hands of the defendant at the time when the action is begun and the application for the writ is made.

It necessarily follows that in order to show a present clear legal right on his part to have the directors of a corporation to declare and pay a dividend on his stock, a stockholder, who sues for a *mandamus* to compel the declaration and payment of such dividend, must allege in his complaint facts disclosing that the corporation has surplus or net profits available for the payment of the dividend within the purview of G.S. 55-115 and G.S. 55-116 at the time when he brings his action and applies for the writ.

The secondary question arising on the appeal is this: Does the complaint allege that the defendant corporation had surplus or net profits available for dividends when the action was begun and the application for the writ of *mandamus* was made?

The complaint does not specifically state that the corporation had accumulated profits at that time, *i.e.,* on 11 October, 1949. It is manifest

that our present inquiry must be answered in the negative unless this essential fact can be inferred from the express averment that "on January 1, 1949, there were undivided profits in the defendant corporation in the sum of $81,604.22 available for the payment of dividends on the cumulative preferred stock."

The plaintiff earnestly insists that this inference must be made. To sustain this position, he cites this statement: "It is well established that when the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." 20 Am. Jur., Evidence, section 207. The precise scope of the rule invoked by plaintiff is perhaps more accurately delineated in *Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493. Be this as it may, the authority cited by plaintiff is not germane to our present problem, which must be solved by the rules of pleading and not by the rules of evidence.

The common-law rule that pleadings are to be construed most strongly against the pleader has been abrogated in this State by G.S. 1-151 which expressly stipulates that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." *Cole v. Wagner,* 197 N.C. 692, 150 S.E. 339, 71 A.L.R. 220.

This statutory rule of liberal construction applies where a complaint is attacked by a general demurrer asserting that it does not state facts sufficient to constitute a cause of action. *Wilson v. Chastain,* 230 N.C. 390, 53 S.E. 2d 290. In such case, the complaint is construed to aver all the facts that can be implied by fair and reasonable intendment from the facts expressly stated. *Seawell v. Cole,* 194 N.C. 546, 140 S.E. 85. But the rule of liberal construction cannot be invoked to read into the complaint an essential fact which has been omitted from it by the pleader. *Lowman v. Comrs. of Lovelady,* 191 N.C. 147, 131 S.E. 277.

The law has devised a practical test for determining what inferences fairly and reasonably follow from facts expressly stated in a pleading. It is simply this: A fact essential to a cause of action is not alleged when it is only to be inferred as a conclusion from other facts specifically averred, which are not inconsistent with the opposite conclusion. *West v. Spratling,* 204 Ala. 478, 86 So. 32; *Coolbough v. Roemer,* 30 Minn. 424, 15 N.W. 869; *Jacobs v. Monaton Realty Ins. Corp.,* 212 N.Y. 48, 105 N.E. 968; *Maylender v. Fulton County Gas & Electric Co.,* 131 Misc. 514, 227 N.Y.S. 209; *Cohn-Hall-Marx Co. v. Gutman,* 185 N.Y.S. 182; *Belmont v. New York,* 191 App. Div. 717, 182 N.Y.S. 173.

Corporate surpluses, like riches, have wings. They are here today, and gone tomorrow. The presence of such a surplus on a particular occasion is not inconsistent with its absence nine months later. Hence, the fact that a corporation has accumulated profits on hand on 11 October, 1949, cannot be fairly and reasonably inferred from the specific averment that it possessed such profits on 1 January, 1949.

For the reasons given, the judgment overruling the demurrer must be Reversed.

WILLIAM ISELIN & CO., INC., v. DAVID L. SAUNDERS, D. D. SAUNDERS, AND W. L. DAVIS, TRADING AS SAUNDERS AND DAVIS.

(Filed 29 March, 1950.)

1. Contracts § 4: Sales § 2—

Where a partner gives a provisional order for goods, conditioned upon approval of his copartners, and, upon refusal of his copartners to approve, gives immediate notice of such disapproval, there is no contract to purchase the goods, and it is immaterial whether the offerer was an independent dealer or a selling agent.

2. Same—

Where an agreement is made with an independent dealer to purchase goods, and the dealer turns the order over to another company, the purchaser is at liberty to refuse to accept the goods, since a person has the right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent.

3. Sales § 16—

Upon sale by sample there is an implied warranty that the bulk of the goods will correspond with the sample in kind and quality, and the purchaser is entitled to reject goods upon breach of such warranty.

4. Principal and Agent § 7f: Sales § 2—

Where the purchaser constitutes another his special agent for the purchase of a limited quantity of goods, and the agent places the order for double the quantity specified, the purchaser is at liberty to reject the quantity of goods delivered in excess of the quantity specified, since a party dealing with a special agent is under duty to acquaint himself with the extent of the agent's authority.

5. Bills and Notes § 18—

The assignee of a nonnegotiable instrument for value and in good faith before maturity nevertheless takes same subject to all defenses which the debtor may have had against the assignor which are based upon facts existing at the time of the assignment or facts arising thereafter but prior to the debtor's knowledge of the assignment. G.S. 1-57.

6. Sales § 20—

Plaintiff was the assignee of an account for the purchase price of goods. *Held:* An instruction to the effect that plaintiff was entitled to recover the purchase price if the jury should find from the greater weight of the evidence that plaintiff purchased the account in good faith for valuable consideration before maturity, must be held for error, since plaintiff nevertheless took the nonnegotiable chose in action subject to all defenses which the debtor may have had against the assignor prior to the debtor's knowledge of the assignment, there being sufficient allegation and evidence in the action of such defenses.

APPEAL by defendants from *Rudisill, J.*, and a jury, at October Term, 1949, of CLEVELAND.

Civil action by assignee to collect a nonnegotiable chose in action from debtor.

There was sharp conflict between the pleadings and evidence of the parties.

The testimony of the plaintiff, a corporation of Columbus, Ohio, made out this case against the defendants, retailers of dry goods at Kings Mountain, North Carolina:

On 18 October, 1946, the defendants, acting through their agent, Consolidated Clothiers, of New York City, New York, gave the Falcon Sportswear Company, a clothing manufacturer of St. Louis, Missouri, an unconditional written order for 100 pairs of "all wool redyed serge" pants at an agreed price of $9.50 per pair. The Falcon Sportswear Company expressed 100 pairs of pants conforming to the order from St. Louis to the defendants at Kings Mountain in two equal consignments on the 23rd and 28th days of January, 1947, and forthwith assigned its account against the defendants for $950.00, the total price of the goods, to the plaintiff, which took the account in good faith and for a valuable consideration while the merchandise was en route from St. Louis to Kings Mountain. Upon the subsequent arrival of the goods at Kings Mountain, the defendants unjustifiably refused to accept or pay for them, and the express company returned the consignments to St. Louis, where the Falcon Sportswear Company declined to receive them. The plaintiff brought the action to recover the sum of $950.00 on the assignment after the defendants had refused its demand for payment.

The evidence of the defendants presented the following version of the events antedating the litigation:

The defendants had no direct contractual relations of any kind with either the Falcon Sportswear Company, or the plaintiff. On 18 October, 1946, David L. Saunders, one of the defendants, visited the office of the Consolidated Clothiers in New York City, and gave the Consolidated Clothiers, which was either an independent wholesale dealer in dry goods

or a selling agent of the Falcon Sportswear Company, a provisional order for 50 pairs of pants conforming to a sample pair of pants, which the Consolidated Clothiers then and there exhibited to him. The Consolidated Clothiers took this order from David L. Saunders on the specific condition that it would not be valid unless it should be approved by his partners, the defendants D. D. Saunders and W. L. Davis, who were then in Kings Mountain. They refused to confirm the provisory order, and immediate notice of that fact was given the Consolidated Clothiers. The defendants had no further connection with or notice of any of the matters resulting in this litigation until the consignments and the invoices covering them reached Kings Mountain. The invoices recited that the Falcon Sportswear Company was shipping the goods to the defendants on its own account, and had assigned the sale price to the plaintiff. The defendants inspected the consignment of 23 January, 1947, immediately after its arrival at Kings Mountain; discovered that it contained 50 pairs of very inferior pants, which did not correspond in kind and quality with the sample exhibited to David L. Saunders by the Consolidated Clothiers three months previously; and rejected the goods. When the consignment of 28 January, 1947, reached Kings Mountain, the defendants declined to inspect or accept it because they had not ordered it. The defendants gave the Falcon Sportswear Company prompt notice of their rejection of each of the shipments, and caused the express company forthwith to return them to St. Louis, where the Falcon Sportswear Company refused to receive them.

The court submitted this single issue to the jury: "Are the defendants indebted to the plaintiff, and if so, in what amount?" The jury answered the issue "$950.00," and the court rendered judgment for the plaintiff accordingly. The defendants excepted and appealed, assigning various excerpts from the charge as error.

Henry B. Edwards for plaintiff, appellee.

J. R. Davis for defendants, appellants.

ERVIN, J. The transactions giving rise to this litigation are susceptible of several constructions which would have afforded the defendants either complete or partial exoneration from liability to the Falcon Sportswear Company if it had sued the defendants directly upon the claim now in suit.

The Falcon Sportswear Company could not have recovered of the defendants for goods sold and delivered without establishing a contract, either express or implied, between it and the defendants, obligating the defendants to accept and pay for the goods.

All direct negotiations on the part of the defendants were had with the Consolidated Clothiers, which may have been acting in any one of three distinct capacities. It may have been a selling agent for the Falcon Sportswear Company, or an independent dealer, or a purchasing agent for the defendants.

Upon one view, the circumstances in the record harmonize with the conclusion that the Consolidated Clothiers acted either as an independent dealer, or as a selling agent for the Falcon Sportswear Company; that it offered to sell goods to the defendants either upon its own account, or in behalf of the Falcon Sportswear Company as its principal; that the defendants rejected the offer; and that in consequence no contract ever came into existence obligating the defendants to purchase goods from either the Consolidated Clothiers as an independent dealer, or from the Falcon Sportswear Company as its principal. *Dodds v. Trust Co.,* 205 N.C. 153, 170 S.E. 652.

Upon another aspect, the transactions between the parties are consistent with the deduction that the Consolidated Clothiers was an independent dealer; that the defendants gave the Consolidated Clothiers an order for goods; that the Consolidated Clothiers turned the order over to the Falcon Sportswear Company, which undertook to fill the order on its own account, and which shipped the goods to the defendants; and that the defendants refused to accept the goods from the Falcon Sportswear Company, and declined to have any dealings with it. If such was the case, the defendants did not become liable to the Falcon Sportswear Company; for they had no agreement with it. The law declares that "everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent." *Arkansas Valley Smelting Co. v. Belden Mining Co.,* 127 U.S. 379, 32 L. Ed. 246, 8 S. Ct. 1308. See, also, in this connection: *Hardy v. Williams,* 31 N.C. 177; *Cincinnati Siemens-Lungren Gas Co. v. Western Siemens-Lungren Co.,* 152 U.S. 200, 38 L. Ed. 411, 14 S. Ct. 523; *School Sisters of Notre Dame v. Kusnitt,* 125 Md. 323, 93 A. 928, L.R.A. 1916D, 792; 46 Am. Jur., Sales, section 42.

Upon a third appearance, the circumstances in the record support the proposition that the Falcon Sportswear Company, acting through its agent, Consolidated Clothiers, contracted to sell certain goods to defendants by sample; that in legal consequence the Falcon Sportswear Company impliedly warranted that the bulk of the goods would correspond with the sample in kind and quality; that the Falcon Sportswear Company breached this implied warranty by shipping to the defendants inferior goods, which did not correspond with the sample in kind and quality; and that the defendants forthwith rejected the goods because

of the breach of warranty and returned them to the Falcon Sportswear Company. If this was the situation, the defendants were not obligated to pay the Falcon Sportswear Company for the rejected goods. *Daniels v. Distributing Co.,* 178 N.C. 15, 100 S.E. 112; Willliston on Sales (Rev. Ed.), Vol. 1, section 255.

Upon a fourth view, the testimony in the record justifies the inferences that the defendants had had no dealings with the Falcon Sportswear Company, and had never held the Consolidated Clothiers out as authorized to act for them; that on or about 18 October, 1946, the defendants employed the Consolidated Clothiers as a special agent with the limited power to buy not exceeding 50 pairs of pants for them; that the Consolidated Clothiers exceeded its limited authority, and undertook to enter into a contract with the Falcon Sportswear Company in the name of the defendants, purporting to bind the defendants to purchase 100 pairs of pants from the Falcon Sportswear Company at a price of $9.50 per pair; that the Falcon Sportswear Company endeavored to perform this alleged contract on its part by shipping 100 pairs of pants in two equal consignments from St. Louis to the defendants at Kings Mountain; and the defendants forthwith refused to accept the consignments, and caused them to be returned to St. Louis, where the Falcon Sportswear Company declined to receive them. If this was the state of things, the defendants were liable to the Falcon Sportswear Company for the price of only 50 pairs of the pants. This is true because a special agent can only contract for his principal within the limits of his authority, and a third person dealing with such an agent must acquaint himself with the strict extent of the agent's authority and deal with the agent accordingly. *Graham v. Insurance Co.,* 176 N.C. 313, 97 S.E. 6; *Swindell v. Latham,* 145 N.C. 144, 58 S.E. 1010; 122 Am. St. Rep. 430; Mechem on Agency (2d Ed.), Vol. 1, section 742; 2 Am. Jur., Agency, section 96; 2 C.J.S., Agency, sections 93, 114.

Notwithstanding the testimony tending to negative or minimize liability of the defendants to the plaintiff's alleged assignor, *i.e.,* the Falcon Sportswear Company, the court instructed the jury in a portion of the charge, which is the subject of the ninth assignment of error, to award the plaintiff the full amount sued for, *i.e.,* $950.00, in response to the only issue submitted to it in case it "should find from the evidence, and its greater weight, that the account in question was sold and assigned to the plaintiff for a valuable consideration and without any notice of fault before maturity, and that the same has not been paid by the defendants."

In so charging the jury, the court committed substantial error, entitling the defendants to a new trial. The instruction contravenes the well settled principle that the assignee of a nonnegotiable chose in action,

though he buys it for value, in good faith, and before maturity, takes it subject to all defenses which the debtor may have had against the assignor based on facts existing at the time of the assignment or on facts arising thereafter but prior to the debtor's knowledge of the assignment. G.S. 1-57; *In re Wallace,* 212 N.C. 490, 193 S.E. 819; *Ricaud v. Alderman,* 132 N.C. 62, 43 S.E. 543; *Loan Association v. Merritt,* 112 N.C. 244, 17 S.E. 296; *Spence v. Tapscott,* 93 N.C. 248; *Havens v. Potts,* 86 N.C. 31; *Bank v. Bynum,* 84 N.C. 24; *Martin v. Richardson,* 68 N.C. 255; *Harris v. Burwell,* 65 N.C. 584; *Mosteller v. Bost,* 42 N.C. 39; *Lackay v. Curtis,* 41 N.C. 199; *King v. Lindsay,* 38 N.C. 77; *Moody v. Sitton,* 37 N.C. 382; *McKinnie v. Rutherford,* 21 N.C. 14; *Jordan v. Black,* 6 N.C. 30. This rule is the inescapable corollary of the bedrock proposition that the assignor of a nonnegotiable chose in action cannot confer upon the assignee a greater right than he possesses.

The verdict and judgment are vacated, and the defendants are granted a

New trial.

ROY McCAMPBELL AND WIFE, MAUDE McCAMPBELL, v. VALDESE BUILDING AND LOAN ASSOCIATION AND C. E. COWAN, TRUSTEE FOR THE VALDESE BUILDING AND LOAN ASSOCIATION.

(Filed 29 March, 1950.)

1. Pleadings § 15—

Upon demurrer, the allegations of a pleading will be taken as true and liberally construed in favor of the pleader, giving him the benefit of every reasonable intendment and presumption. G.S. 1-151.

2. Same—

A pleading must be fatally defective before it will be rejected as insufficient.

3. Pleadings § 5—

Plaintiff will be granted that relief to which the facts alleged and proved entitle him even though there be no formal prayer for relief corresponding with the allegations, and even though relief of another kind may be demanded.

4. Frauds, Statute of, § 13—

The provisions of G.S. 22-2 may not be taken advantage of by demurrer.

5. Contracts § 21—

Allegations to the effect that the mortgagee agreed to have the mortgagor transfer the equity of redemption to plaintiffs, that plaintiffs would assume the loan and that the mortgagee would use the sum of $1,000.00, then remaining on hand out of the original loan, to complete the house on the premises, and that the mortgagee, after conveyance of the property in

accordance with the agreement, failed and refused to use the balance of funds on hand to complete the house, *is held* sufficient to state a cause of action as against demurrer.

APPEAL by plaintiffs from *Rudisill, J.,* at October Term, 1949, of BURKE.

Civil action to recover damages for breach of contract, etc.

Plaintiffs allege in their complaint substantially these facts:

(1) That on 28 February, 1947, John L. Bragg, Jr., and his wife executed and delivered to C. E. Cowan, Trustee, a certain deed of trust, conveying certain land which had been conveyed to them on 7 January, 1947, by a certain deed, registered in the office of Register of Deeds of Burke County, as security for a loan from the Valdese Building and Loan Association "in the principal amount of $6,000, which provided for consecutive monthly payments thereafter" (paragraphs 3 and 4); that the Braggs permitted the payments to become in default, and vacated the premises and turned same over to the Building and Loan Association, and that there was then located on the premises a new dwelling house which in many respects was incomplete. (Paragraph 5.)

(6) That plaintiffs and defendant, Building and Loan Association, after discussing the matter of transferring the premises and loan to plaintiffs, and pursuant thereto, made this "contract and agreement":

"(a) The defendant Valdese Building & Loan Association was to have the premises conveyed by proper deed from John L. Bragg, Jr., and wife, Dorothy Jean Bragg, to the plaintiffs;

"(b) That plaintiffs were to assume the balance due upon the original loan;

"(c) That plaintiffs were to pay $55.00 in order to bring the payments to a current basis;

"(d) That plaintiffs were to pay monthly payments thereafter in the amount of $45.00 until the balance of the indebtedness, together with interest, was paid in full;

"(e) That the defendant Valdese Building & Loan Association had on hand from the original loan the sum of $1,000 or more from which to pay for items of work and installations necessary to complete the dwelling house located on said premises;

"(f) That the items of work and installations to be so completed were as follows: (1) install a complete bath (2) construct a septic tank (3) provide 6 inside doors, and (4) finish the floors;

"(g) That the plaintiffs were to arrange for the above work to be done and the defendant Valdese Building & Loan Association was to make payment from the funds above referred to."

"(7) That, pursuant to said agreement and contract, warranty deed was made from John L. Bragg, Jr., and wife . . . to the plaintiffs, conveying said premises, dated 12 February, 1948 . . . and said loan balance was transferred to the plaintiffs on 16 February, 1948, at which time plaintiffs paid the defendant Valdese Building and Loan Association the payment required to place the loan on current basis in the amount of $55.00.

"(8) That plaintiffs obtained prices and bids covering the work and installations above referred to, but upon discussing the same with Mr. L. E. Deaton, agent of defendant Valdese Building & Loan Association, from time to time were put off and delayed from having said work performed, and finally, many months after February 16, 1948, the plaintiffs were advised that the defendant Valdese Building & Loan Association would not pay for the completion of the work and installations above referred to. That many requests and demands have been made to the defendant Valdese Building & Loan Association that the work be completed.

"(9) That, upon the defendant Valdese Building & Loan Association refusing to complete the work, the plaintiffs refused to make monthly payments required until such work was completed as agreed and contracted. That on July 22, 1949, the defendant C. E. Cowan, Trustee for the Valdese Building & Loan Association, advertised the sale of the said premises under the said deed of trust on the 22nd day of August, 1949, at which sale the highest bid received was from the defendant Valdese Building & Loan Association in the sum of $3,600.

"(10) That the failure of the defendant Valdese Building & Loan Association to complete the work and installations set forth above, as agreed and contracted, has damaged the plaintiffs in the sum of $1,000. That said sum of $1,000 would be required to complete the work, and is considerably more than the five payments of $45.00 each now in default by the plaintiffs. That, therefore, the foreclosure of the said deed of trust is unwarranted, inequitable, and would result in irreparable damage to the plaintiffs.

"(11) That plaintiffs have been, and are now, ready, willing and able to make the payments upon the loan as agreed to when the defendant Valdese Building & Loan Association performs its obligations under said agreement and contract."

Upon these allegations plaintiffs pray judgment against defendants, as follows:

"(a) Judgment in the sum of $1,000;

"(b) That the defendants be ordered to credit said loan with the amount of the above judgment;

"(c) That the said loan and indebtedness be re-amortized and payments adjusted in accordance with the foregoing, and note and deed of trust be reformed accordingly;

"(d) That the defendants desist from proceeding with the foreclosure of said deed of trust;

"(e) That any attempted conveyance of the said premises by the defendants, or their assigns, shall be declared subject to the judgment rendered in this action;

"(f) For the cost of this action to be taxed by the Clerk;

"(g) And for such further relief as the court deems necessary and proper."

Defendants demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action, in that it appears upon the face of the complaint:

1. That it is not alleged that the contract is in writing, as required by statute of frauds. (G.S. 22-2.)

2. That plaintiffs only purchased and had conveyed to them the equity of redemption of the Braggs in and to the land in question,—knowing that the land was subject to and encumbered by the deed of trust, and that the grantors were in default in the payments due on the indebtedness secured thereby.

3. That defendants have done all things required of them under the agreement, and plaintiffs have failed to make monthly payments and to finish the dwelling house as they agreed to do.

Upon hearing thereon, the demurrer was sustained, and the action dismissed.

Plaintiffs appeal to the Supreme Court and assign error.

Edw. M. Hairfield for plaintiffs, appellants.

O. L. Horton for defendants, appellees.

WINBORNE, J. Is there error in the judgment sustaining defendants' demurrer to the complaint of plaintiffs, on the ground that the allegations contained therein are insufficient to state a cause of action?

"The office of demurrer is to test the sufficiency of a pleading, admitting for the purpose, the truth of the allegations of the facts contained therein, and ordinarily relevant inferences of facts, necessarily deducible therefrom, are also admitted," *Stacy, C. J.*, in *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761. See also *Dickensheets v. Taylor,* 223 N.C. 570, 27 S.E. 2d 618; *Penn v. Coastal Corp., ante,* 481, and numerous other cases.

Both the statute, G.S. 1-151, and the decisions of this Court, applying the statute, require that the pleading be liberally construed, and that

every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. *Ins. Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 361; *Cotton Mills v. Mfg. Co.,* 218 N.C. 560, 11 S.E. 2d 550; *Corbett v. Lumber Co.,* 223 N.C. 704, 28 S.E. 2d 250; *Sandlin v. Yancey,* 224 N.C. 519, 31 S.E. 2d 532; *Ferrell v. Worthington,* 226 N.C. 609, 39 S.E. 2d 812; *Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835; *Winston v. Lumber Co.,* 227 N.C. 339, 42 S.E. 2d 218; *Wilson v. Chastain,* 230 N.C. 390, 53 S.E. 2d 290; *Davis v. Rhodes, ante,* 71, 56 S.E. 2d 43.

Moreover, the liberal rule of construction is that the court will grant relief according to the facts alleged and proved, though there be no formal prayer for relief corresponding with the allegations, and even though relief of another kind may be demanded. McIntosh N. C. P. & P., Section 370 (2). *Voorhees v. Porter,* 134 N.C. 591, 47 S.E. 31; *Bradburn v. Roberts,* 148 N.C. 214, 61 S.E. 617.

Applying these principles to the allegations of the complaint, we are unable to say that in no view no cause of action is stated.

As to the first ground upon which demurrer is based: Defendants, in their brief filed in his Court, now concede that in this State the provisions of the statute of frauds, G.S. 22-2, may not be taken advantage of by demurrer. See *Hemmings v. Doss,* 125 N.C. 400, 34 S.E. 511, and cases cited. See also *Embler v. Embler,* 224 N.C. 811, 32 S.E. 2d 619.

As to the other grounds upon which the demurrer is based, it appears that the complaint alleges, at least, that $1,000 of the original loan to the Braggs was unspent and in the hands of the defendant Building and Loan Association at the time plaintiffs entered the picture, and that the Building and Loan Association agreed with plaintiffs that it would pay this amount in completing the unfinished dwelling in the respects detailed, and that it, the Building and Loan Association, later declined to do so. Taking these allegations to be true, it would seem that the complaint is not fatally defective.

Hence the judgment sustaining the demurrer is

Reversed.

STATE v. RALPH J. PENNELL.

(Filed 29 March, 1950.)

1. Homicide § 11—

A person who is in his own home when an unprovoked assault is made upon him is not required to retreat, regardless of the nature of the assault, but is entitled to fight in his own defense.

2. Homicide § 16—

The burden is upon defendant to prove to the satisfaction of the jury the predicate facts of self-defense when relied on by him.

APPEAL by defendant from *Rudisill, J.*, at November-December Term, 1949, of CALDWELL.

Criminal prosecution upon indictment charging defendant with the murder of one Clarence Russell.

Defendant, upon arraignment, entered a plea of not guilty.

Thereupon, the Solicitor, in open court, stated that in the trial the State would not ask for a verdict of murder in the first degree, but only for a verdict of murder in the second degree, or manslaughter, as the facts might warrant.

Upon the trial in Superior Court the State offered evidence tending to show this narrative: The homicide charged against defendant took place near midnight on 26 October, 1949, at and in the home of defendant. At the time the deceased, Clarence Russell, and another man, one Robert Horton, and the defendant had been and were drinking, and there was no unpleasantness between them. But the defendant left the others and went into his bedroom, and first called Robert Horton to "Come here a minute, Rob"; but upon Horton appearing at the door, defendant said "Back up," and Horton heard a click, and admonished defendant "Don't do that." Defendant said again "Back up." Then defendant called: "Clarence, you come here." Whereupon, Horton said: "Clarence don't you go," and asked defendant if he were mad, to which defendant replied "No." Then a gun fired, and Clarence Russell was shot, and died therefrom about 28 hours thereafter. The deceased was about 6 feet tall, and weighed well over 200 pounds.

On the other hand, defendant, testifying as witness, narrated the occurrence in this manner: Defendant and Robert Horton had worked together during the day, and had come to defendant's home to get supper. While defendant was "building a fire in the stove," Clarence Russell, the deceased, who was 39 years of age, came there. He, Clarence, had a bottle of liquor. The three of them drank some of it . . . drank it empty. Then they went down town in Clarence's "pick-up." Some argument arose about "getting out of gas." Defendant said he was going back,—whereupon Clarence ordered him to get back in the car, and he did. After visiting a filling station, and going by a girl's house, the three returned to defendant's home. Clarence asked for a potato, and defendant gave it to him. Horton asked for an onion, and defendant gave him one. "Just a little bit, not long" after that Clarence said, "Where is my liquor at?" Defendant replied, "It looks like we drank it all up." Then defendant testified: "He kicked me in the side, and jerked out his knife

and I ran back from the middle of the dining room back into my bedroom, as far as I could go, and Clarence was right after me with his knife, and I said 'What is the matter, Clarence? Are you mad at me?' I told him I was not mad at him . . . and he kept on coming, and I picked up the rifle . . . at the head of my bed where I keep it . . . Clarence said I had taken his liquor. I had not taken any, but I had helped drink it . . . I shot because I was scared he was coming on me with that knife, and I was scared."

Also the testimony of defendant is that he has "nerve trouble." He is a "veteran of World War I," and has "permanent partial disability."

And on cross-examination, defendant reiterates his version of the occurrence, and says that Clarence was striking at him with his knife.

Verdict: Guilty of murder in the second degree.

Judgment: Confinement in the State Prison at Raleigh at hard labor, or such labor as he is capable of performing, for a period of not less than fifteen years nor more than eighteen years.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Max C. Wilson, G. W. Klutz, and Hal B. Adams for defendant, appellant.

WINBORNE, J. While defendant presents on this appeal many assignments of error based upon exceptions, taken during the course of the trial below, to rulings of the court in respect of admission and exclusion of evidence, and motions to nonsuit, and to the charge of the court to the jury, and to failure of the court to charge in certain aspects, it is deemed necessary to treat of only four of them, Nos. 21, 23, 25 and 28, that point out error which entitles defendant to a new trial. See *S. v. Grant,* 228 N.C. 522, 46 S.E. 2d 318, and cases cited.

The first three of the above numbered assignments of error relate to exceptions to portions of the charge as given, and the last relates to exception to the failure of the court to charge on the law of self-defense invoked by the plea of defendant upon the facts of the case as he contends them to be. It is pointed out by defendant that, in the charge to which the above exceptions relate, his right to self-defense, and upon which he relies as justification of his act in shooting Clarence Russell, is made to depend upon the establishment by defendant to the satisfaction of the jury, among other legal requisites, of facts which would bring him within the doctrine of retreat at the time the fatal shot was fired.

While it is conceded that the charge as given might be applicable to a different factual situation, it is rightly contended that it is inapplicable

to a case where the party assaulted is at the time in his own home. In the present case all the evidence, that of the State as well as that of defendant, shows that the homicide occurred in the home of the defendant.

Ordinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home, or place of business, or on his own premises, the law imposes upon him no duty to retreat before he can justify his fighting in self-defense,—regardless of the character of the assault. *S. v. Harman,* 78 N.C. 515. *S. v. Bost,* 192 N.C. 1, 133 S.E. 176; *S. v. Glenn,* 198 N.C. 79, 150 S.E. 663; *S. v. Bryson,* 200 N.C. 50, 156 S.E. 143; *S. v. Roddey,* 219 N.C. 532, 14 S.E. 2d 526; *S. v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271; *S. v. Pennell,* 224 N.C. 622, 31 S.E. 2d 857; *S. v. Minton,* 228 N.C. 15, 44 S.E. 2d 346; *S. v. Grant, supra,* and numerous other cases. See also *S. v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142, where the cases on the subject are assembled.

The principle is expressed in *S. v. Harman, supra,* in opinion by *Reade, J.,* in this manner: "If prisoner stood entirely on defensive and would not have fought but for the attack, and the attack threatened death or great bodily harm, and he killed to save himself, then it was excusable homicide, although the prisoner did not run or flee out of his house. For, being in his own house, he was not obliged to flee, and had the right to repel force with force and to increase his force so as not only to resist but to overcome the assault."

Again in *S. v. Bryson, supra, Stacy, C. J.,* speaking to the subject, said: "The defendant being in his own home and acting in defense of himself, his family and his habitation . . . was not required to retreat, regardless of the character of the assault," citing *S. v. Glenn, supra,* and *S. v. Bost, supra.*

And in *S. v. Pennell, supra,* the principle is restated by *Barnhill, J.*: "Defendant was in his own place of business. If an unprovoked attack was made upon him and he only fought in self-defense, he was not required to retreat, regardless of the nature of the assault."

Applying the principle enunciated in these decisions, the doctrine of retreat has no place in the present case, and it is immaterial whether the assault be felonious or nonfelonious.

But as the decisions of this Court uniformly hold, this principle does not relieve the defendant of the burden of satisfying the jury as to the essential elements of the principle of law as to the right of self-defense available to one assaulted in his own home.

We do not intimate any opinion on the facts. What they are is a matter for the jury.

Other assignments of error relate to matters which may not recur upon another trial.

The error pointed out is prejudicial to the defendant, and on account of it, he is entitled to a

New trial.

E. A. GOINS v. RONALD McLOUD, LOU CHANDLER AND HUSBAND, CEPH CHANDLER, AND SARA DYSON.

(Filed 29 March, 1950.)

1. Deeds § 2a (2)—

The burden of proving mental incapacity is upon the party attacking the validity of the deed on this ground.

2. Same: Evidence § 32—

A party interested in the event may testify as to transactions with a decedent when such testimony relates solely to the issue of mental capacity. G.S. 8-51.

3. Deeds § 2a (2)—

Upon attack of a deed of bargain and sale on the ground of mental incapacity, interrogation of witnesses as to their opinion whether grantor knew the nature and extent of his property and the natural objects of his bounty and realized the full force and effect of his disposing of his property by deed, must be held for prejudicial error, the test of mental capacity to execute a deed being the ability to know and understand the nature, scope and effect of his act in executing same.

4. Appeal and Error § 39b—

Prejudicial error in the trial of the issue of mental capacity entitles appellant to a new trial notwithstanding the affirmative finding of the jury upon the issue of fraud and undue influence when the mental condition of grantor is an eminent factor affecting the answer to the issue of fraud and undue influence.

PLAINTIFF'S appeal from *Bennett, Special Judge,* October Term, 1949, CALDWELL Superior Court.

W. H. Strickland for plaintiff, appellant.

Max C. Wilson for defendants, appellees.

SEAWELL, J. The plaintiff sued in ejectment to recover possession of certain lands, which he claims in fee, alleging that the defendants were in wrongful possession thereof and committing various acts of trespass to his great damage.

Defendants, separately answering, denied plaintiff's title; and defendants Dyson and Chandler, both heirs at law of S. M. McLoud, from

whom plaintiff derives title, attack the validity of the deed to plaintiff, alleging that the grantor McLoud was mentally incompetent to make it, and that it was obtained by fraud and undue influence practiced by plaintiff on the grantor, taking advantage of his extreme age, weakness and feebleness of mind.

The following issues were submitted to the jury and answered as indicated:

"1. Did S. M. McLoud on September 25, 1939, have sufficient mental capacity to execute the deed in question?

"Answer: No.

"2. Was the execution of the said deed procured by fraud or undue influence on the part of the plaintiff?

"Answer: Yes.

"3. What, if any, was the consideration for the deed from S. M. McLoud to the plaintiff?

"Answer: $200.00."

Plaintiff in apt time moved to set aside the verdict for errors committed during the trial, the motion was declined, and plaintiff excepted. Judgment upon the issues was entered declaring the plaintiff's deed void, adjudging title to be in the defendants, with other provisions not necessary to mention.

The plaintiff objected, excepted and appealed.

While there are other exceptions taken during the trial that appeal to us as meritorious, only those within the rationale of the decision are here discussed.

Whether S. M. McLoud had mental capacity to make the deed on which plaintiff relied became of first importance to the determination of this controversy. On this question the burden was upon the defendants who attacked the deed. In evidence admitted over plaintiff's objection the defendants sought to establish the want of mental capacity in two ways. First, by showing by those who had observed him in ordinary ways of life, incidents, conduct, and conversation, claimed to be so erratic and abnormal as to indicate irrationality of varying degree; acts which indicated he was not *en rapport* with his surroundings; wanting in awareness, perception and reason. Incidents of that nature were put in evidence, over objection, by testimony of interested parties—amongst them by the two defendants, children and heirs at law of McLoud. Plaintiff objected to the testimony because of its supposed infraction of G.S. 8-51 which excludes certain interested witnesses from testifying to personal transactions had with persons since deceased,—popularly known as the "dead

man's statute"—the compass of which has never yet been satisfactorily or ultimately defined.

It is sufficient here to say that the testimony relating to the conduct of McLoud, if the incidents mentioned could be defined as transactions, is used only as a basis for the inference that he was wanting in mental capacity of the kind necessary to make a deed, and as used here is not offensive to the statute.

Second, the defendants sought to establish want of mental capacity by opinion evidence, all of it non-expert; and addressed to nearly all the witnesses a formula of frequent use in will cases, and which plaintiff contended contained implications not applicable to deeds. "Q. . . . do you have an opinion satisfactory to yourself as to whether or not on September 25, 1939, he had sufficient mental capacity to know the nature and extent of his property, and to know who were the natural objects of his bounty, and to realize the full force and effect of disposing of his property by deed?"

The question in this form was put to each of the defendants Dyson and Chandler, and to defendants' witnesses Lonnie Harrison, F. H. Hoover, Tom Moser, Nannie Goins, Mrs. Ronald McLoud; its frequency and the fact that it crowns the examination of each witness, it is contended, augments the effect of the error, if error it was.

Among other objections to the form and substance of the question, appellant points out that the deed was one of bargain and sale and not a deed of gift, and in the making had nothing to do with the persons naturally to be considered as the recipients of the grantor's bounty, or any precise understanding of the effect of the disposition he was making of the property with respect to such persons, but only to understand the nature and effect of his act.

We are inclined to agree that the question commonly used to test the mental capacity to make a will is in form and substance improper as a test of mental capacity to make a deed. Even if the degree of mentality required may be the same, and it is not necessary to pass on that, the test should be strictly applicable to the circumstances in which the grantor is placed, and these are quite different from the testator making a will.

Although the propriety of the formula in will cases is frequently questioned, it is uniformly accepted in this State as the test of mental capacity to make a will. Its validity, however, rests more upon convention and long acceptance than in logic, especially when addressed to persons non-expert either in psychiatry or law. However well established for a test for mental capacity to make a will, we have no authority in this State for expanding it or extending it to mental capacity to make a deed, and are constrained to hold its admission for that purpose as prejudicial error.

It is said in *Sprinkle v. Wellborn,* 140 N.C. 163, (loc. cit. 181) 52 S.E. 666:

> "We have said in *Cameron v. Power Co.,* 138 N.C. 365, which sustains the charge of the court, that this Court has adopted Coke's definition, that a person has mental capacity sufficient to contract if he knows what he is about (*Moffit v. Witherspoon,* 32 N.C. 185; *Paine v. Roberts,* 82 N.C. 451), and that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly. There is no particular formula to be used in such cases, as said by the Court in *Morris v. Osborne, supra* (104 N.C. 609), but the law in this respect should be explained to the jury with reference to the special and peculiar facts of the case being tried, and under the guidance of such general principles as have been settled and declared by the courts."

On the second issue the jury found that the deed was procured through fraud and undue influence. Standing alone, this might have justified a judgment vacating and canceling the deed. But the question of undue influence and fraud is, in both the complaint and evidence, so tied up with the mental condition of the grantor, McLoud, as to make that, perhaps, the strongest factor leading to the answer to the second issue. Indeed, without it the evidence of fraud and undue influence is, perhaps, too tenuous for consideration. *Allore v. Jewel,* 94 U.S. 506, 24 L. Ed. 260; *Wessell v. Rathjohn,* 89 N.C. 377; *Sprinkle v. Wellborn, supra.*

For the errors noted and the reasons herein assigned, the plaintiff is entitled to a new trial. It is so ordered.

Error. New trial.

S. PRENTISS McKAY (UNMARRIED) v. H. C. CAMERON, JR., AND C. C. (LUM) CUMMINGS.

(Filed 29 March, 1950.)

1. Evidence § 39—

Where there is no latent ambiguity in a deed and no equity invoked, parol evidence to explain or alter the instrument, is incompetent.

2. Deeds § 22—

A deed for timber of a specified size, with full right of ingress and egress to a specified date, with further provision that if grantee should

not commence to cut timber within the time specified the deed should become null and void, *is held*, as a matter of legal construction, to give the grantee a reasonable time to cut and remove the timber covered by the deed after the expiration of the time stipulated.

PLAINTIFF'S appeal from *Morris, J.*, February Term, 1950, HARNETT Superior Court.

Neill McK. Salmon for plaintiff, appellant.
Chas. Ross and Neill McK. Ross for defendants, appellees.

SEAWELL, J. The plaintiff, owner of certain described lands in Harnett County, made a deed to S. V. Stevens conveying all the pine, oak and poplar trees of certain dimensions on the tract described, with provisions for ingress and egress for cutting and removing the timber. With respect to time the following limitations occur:

"Together with full right and privilege for and during the period 27 (twenty-seven) months to March 19, 1949, from the date of this conveyance, in person or through his agents or servants, to enter upon said lands, and pass and repass over the same at will, on foot or with teams and conveyances, to cut and remove said timber, and to construct and operate any roads, tramways or railroads over and upon said lands, as the said party of the second part, his heirs and assigns, may construct upon and over the said lands so long as they may so desire, either for the removal of said timber or any other purpose."

"It is understood and agreed by the said party of the first part that the said party of the second part, his heirs and assigns, shall have until March 19, 1949, or 27 months from date of this conveyance, to commence the cutting and removing of the said timber, and in case the same is not commenced within that time, then this conveyance, and all agreements and provisions hereof, are to be null and void."

Subsequently Stevens sold and conveyed the timber to the defendant Cameron in a deed of like character, passing to the grantee all the right, title and interest he had under the conveyance of McKay to him, and no more.

The defendant entered upon the lands prior to March 19, 1949, and began cutting and removing timber. On March 21, thereafter, plaintiff began this action for permanent injunction against the defendant to restrain him from cutting and removing the timber and obtained a tempo-

rary restraining order. The summons, complaint and restraining order were served March 21, 1949.

The matter came on for a hearing before Judge Chester Morris at February Term, 1950, of Harnett County Superior Court and was heard upon stipulations of fact and under an agreement that Judge Morris should hear and determine the controversy without a jury, and consent by parties that he might sign judgment out of term and out of the county.

At the hearing plaintiff offered evidence in parol by Stevens, the first grantee, to the effect (a) that it was understood between the parties to that deed that the grantee had only unil March 19, 1949, to complete the cutting and removing of the timber and (b) that he had informed the defendant of that understanding at the time he had conveyed to him and that he conveyed with that understanding. All this evidence was rejected and plaintiff excepted.

The controversy turned on the proper construction of the provisions in the Stevens-Cameron deed, which are the same as those in the McKay-Stevens deed above noted.

Construing the deed Judge Morris entered judgment, finding against the plaintiff, adjudging the defendant to have the right to continue the cutting of the timber, dissolved the restraining order, and retained the cause for inquest of damages allegedly sustained by defendant by reason of the restraint of his operations.

1. The parol evidence offered by plaintiff was addressed to the intent and understanding of the parties at the time the McKay-Stevens deed was made and delivered, sought to be imposed on the phraseology used in the deed, and was properly excluded. *Glover v. Glover,* 224 N.C. 152, 29 S.E. 2d 350; *Flynt v. Conrad,* 61 N.C. 190.

There is no latent ambiguity in the deed, and no equity pleaded or involved, which could form an exception to the rule (of Hornbook quality) rejecting parol evidence to explain or alter an instrument required to be in writing.

Such a writing is not merely a memorandum to refresh the memory of witnesses; it is a memorial which eschews and survives the faulty memory of men and speaks the truth without prejudice or bias. If subject to unlimited attack by parol the writing would become a mere ritual, affording no security for the rights which it is designed to protect.

In passing on the intent and effect of these conveyances, which must be gotten from the four corners of the instrument, we are guided by the rule that in resolution of doubt in interpretation the instrument must be construed most favorably to the grantee; *Sheets v. Walsh,* 217 N.C. 32, 38, 6 S.E. 2d 817; *Brown v. Brown,* 168 N.C. 4, 10, 84 S.E. 25; *Krites v. Plott,* 222 N.C. 679, 681, 24 S.E. 2d 531.

The construction put upon the deed in the court below must be approved. It follows that the defendant, the grantee by *mesne* conveyance, having entered on the premises within the designated time and begun the operation, has, under applicable decisions of this Court, a reasonable time to cut and remove the timber covered by the deed. *Chandler v. Cameron,* 227 N.C. 233, 41 S.E. 2d 753; *Bunch v. Lumber Co.,* 134 N.C. 116, 46 S.E. 24; *Hawkins v. Lumber Co.,* 139 N.C. 160, 51 S.E. 852; *Krites v. Plott, supra.*

We find no error in the proceeding in the court below, and the judgment rendered therein is

Affirmed.

WAYNE COUNTY BOARD OF EDUCATION (ORIGINAL PARTY PLAINTIFF) AND R. S. PROCTOR, SUPERINTENDENT OF PUBLIC INSTRUCTION OF WAYNE COUNTY (ADDITIONAL PARTY PLAINTIFF), v. GEORGE E. LEWIS, NORA J. LEWIS, MARIE L. LEWIS, AND H. T. RAY, TRUSTEE.

(Filed 29 March, 1950.)

1. Schools § 6d—

Where the County Board of Education selects a site for an elementary school contiguous to its high school site, it may condemn for such elementary school site lands not in excess of ten acres, G.S. 115-85, since the Board has the discretionary power to locate the schools on adjoining sites and the statute does not have the effect of limiting the acreage of both schools to ten acres.

2. Schools § 6a—

The right and duty to select school sites is vested in the sound discretion of the local school authorities, and the courts will not restrain or otherwise interfere with the selection of such sites unless it is made to appear that the local authorities have violated some provision of law or there has been a manifest abuse of discretion on their part.

APPEAL by defendants from *Morris, J.,* at January Term, 1950, of WAYNE.

The County Board of Education of Wayne County, North Carolina, on 4 October, 1948, by resolution duly adopted, authorized its chairman to negotiate with the defendants for the purchase of 7.5 acres of land owned by them in the town of Mount Olive, as a site for the location of a new grammar school.

The negotiations for the purchase of the property were unsuccessful and the property was condemned, as provided in G.S. 115-85 and other appropriate statutes.

The defendants declined to accept the award of the appraisers in the sum of $11,499.50, and appealed to the Superior Court, where the jury awarded a verdict in favor of the defendants for $10,000.00. Appeal was taken to this Court from the verdict and judgment entered therein, but the appeal was dismissed and the judgment affirmed without written opinion, for failure on the part of the appellants, to comply with the requirements of Rules 19 and 21 of the Rules of Practice in the Supreme Court, 221 N.C. 546, *et seq.*

Present counsel of record for the appellants did not appear in the original condemnation proceedings, but were employed to resist an order for a writ of assistance to enable the Wayne County Board of Education to obtain possession of the condemned lands.

It appears that the Wayne County Board of Education now owns about six acres of land in the town of Mount Olive, on which the Mount Olive High School is located; and that the site condemned in this proceedings, consisting of 7.5 acres of land, to be used for a grammar school site, adjoins the high school site at one point for a distance of some 215 feet.

From an order granting the writ of assistance, the defendants appeal and assign error.

Fred P. Parker, Jr., Dees & Dees, and J. Faison Thomson for plaintiffs.

J. C. B. Ehringhaus, Jr., J. A. Jones, Weston O. Read, and Thomas B. Griffin for defendants.

DENNY, J. The defendants take the position that since Wayne County Board of Education owns a six acre site on which the Mount Olive High School is located, and the proposed site for an elementary school adjoins the high school site, the Board was only authorized by the statute, G.S. 115-85, to condemn an additional acreage which together with the present high school site would not exceed ten acres.

We do not construe the limitation in the statute to place any such restriction on a county board of education. The high school site and the proposed site for a new elementary school, constitute separate school sites, and the mere fact that they adjoin is incidental.

There is no limitation on the acreage which may be purchased or donated for a school site. The limitation applies only where the site, or any part thereof, must be obtained by condemnation. In such cases, the land owned, donated or purchased, together with the adjacent lands to be condemned, shall not exceed ten acres. *Board of Education v. Pegram,* 197 N.C. 33, 147 S.E. 622; *Board of Education v. Forrest,* 190 N.C. 753, 130 S.E. 621. We do not interpret the statute to prohibit the location of

a high school and an elementary school on adjoining sites. However, neither site may contain more than ten acres of land, if any part thereof must be obtained by condemnation.

In view of our interpretation of the provisions of G.S. 115-85, and its application to the facts in this case, the right of the Wayne County Board of Education to the possession of the premises in controversy follows as a matter of law; and any discussion of its right to have the court issue a writ of assistance, in order for it to obtain possession of such land, would be purely academic.

The right and duty to select school sites is vested in the sound discretion of the local school authorities, G.S. 115-85; and the courts will not restrain or otherwise interfere with the selection of such sites, unless it is made to appear that the local authorities have violated some provision of law, or there has been a manifest abuse of discretion on their part. *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *Board of Education v. Forrest, supra; School Commissioners v. Aldermen,* 158 N.C. 191, 73 S.E. 905; *Venable v. School Committee,* 149 N.C. 120, 62 S.E. 902. No violation of law or abuse of discretion having been made to appear on the part of the plaintiffs, the judgment of the court below is

Affirmed.

STATE OF NORTH CAROLINA EX REL. RALPH BARLOW AND JACK MOORE v. C. O. BENFIELD.

(Filed 29 March, 1950.)

1. Public Officers § 1—

The office of chief of police of an incorporated town is a public office.

2. Elections § 18a—

The qualified voters and taxpayers of a municipality may maintain *quo warranto* to determine the right of incumbent to hold a municipal office.

3. Municipal Corporations §§ 11a, 11½b—

A person not a resident of an incorporated municipality may not be elected chief of police by the board of commissioners of the municipality. G.S. 160-25.

APPEAL by relators from *Rudisill, J.,* November Term, 1949, of CALDWELL. Reversed.

This was an action in the nature of *quo warranto* to determine the right of defendant Benfield to hold the office of chief of police of Granite Falls.

At the close of plaintiffs' evidence, motion for judgment of nonsuit was allowed, and relators excepted and appealed.

Martin & Carpenter for plaintiffs, appellants.
L. M. Abernethy and Max C. Wilson for defendant, appellee.

DEVIN, J. The judgment of nonsuit was improvidently entered. It was made to appear from the admissions in the answer and the evidence offered by the relators that 1 July, 1949, the defendant was elected by the Board of Commissioners of Granite Falls as chief of police of that town, which office he is now holding, and that defendant is not a qualified voter therein. It was also admitted that relators are residents, qualified voters, and taxpayers of Granite Falls.

The office of chief of police of an incorporated town, as Granite Falls is admitted to be, is a public office. *Foard v. Hall,* 111 N.C. 369, 16 S.E. 420. The relators had a right to institute this action for the cause set out in the complaint. *Bouldin v. Davis,* 197 N.C. 731, 150 S.E. 507; *Midgett v. Gray,* 158 N.C. 133, 73 S.E. 791. The statute (G.S. 160-25) provides that "No person shall be mayor, commissioner, intendant of police, alderman or other chief officer of any city or town unless he shall be a qualified voter therein." This statute, said *Chief Justice Clark* in *Foard v. Hall, supra,* "embraces the office of chief of police."

The judgment of nonsuit must be vacated.

Reversed.

STATE v. MILES HERNDON DAVIS.

(Filed 29 March, 1950.)

1. Criminal Law § 77d—

The record imports verity and the Supreme Court is bound thereby.

2. Criminal Law § 40b—

Defendant is entitled to have evidence of his general reputation as a man of good moral character considered by the jury as substantive proof of his innocence, and an instruction that it constituted "substantive evidence bearing upon the defendant's credibility as a witness" must be held for reversible error.

APPEAL by defendant from *Parker, J.,* October Term, 1949, of PITT.

Criminal prosecution on indictment charging the defendant with crime against nature.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Imprisonment in the State's Prison for a term of not less than five nor more than seven years.

Defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Albion Dunn for defendant.

STACY, C. J. The following excerpt from the charge forms the basis of one of the defendant's exceptive assignments of error:

"The defendant further contends and says that he has offered evidence that he bears the general reputation of being a man of good moral character. The court instructs you that that is substantive evidence bearing upon the defendant's credibility as a witness, that is, his worthiness of belief when he testified in this case for himself."

It seems quite probable that something may have been omitted by the reporter in transcribing the portion of the charge here assigned as error. However this may be, the record imports verity and we are bound by it. *S. v. Dee,* 214 N.C. 509, 199 S.E. 730; *Gorham v. Ins. Co.,* 215 N.C. 195, 1 S.E. 2d 569.

Speaking to a similar instruction in the case of *S. v. Moore,* 185 N.C. 637, 116 S.E. 161, *Hoke, J.,* delivering the opinion of the Court, commented as follows:

"It is fully recognized in this jurisdiction that in an indictment for crime, a defendant may offer evidence of his good character and have same considered as substantive testimony on the issue of his guilt or innocence. And where in such case a defendant has testified in his own behalf and evidence of his good character is received from him, it may be considered both as affecting the credibility of his testimony and as substantive evidence on the issue. *In re McKay,* 183 N.C. 226-228; *S. v. Morse,* 171 N.C. 777; *S. v. Cloninger,* 149 N.C. 578; *S. v. Traylor,* 121 N.C. 674; *S. v. Hice,* 117 N.C. 782." See, also, *S. v. McMahan,* 228 N.C. 293, 45 S.E. 2d 340; *S. v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657; *S. v. Ferrell,* 202 N.C. 475, 163 S.E. 563; *S. v. Whaley,* 191 N.C. 387, 132 S.E. 6.

Following the precedent set in the *Moore Case,* a new trial will be ordered here.

New trial.

STATE v. DEXTER McNEILL.

(Filed 29 March, 1950.)

Criminal Law § 50d—

In this prosecution of defendant for willful failure to support his illegitimate child, the action of the court, in the presence of the jury, in ordering the sheriff to take defendant's witness into custody immediately after the witness had testified for defendant that he had had intercourse with prosecutrix, must be held for prejudicial error as disparaging or impeaching the credibility of the witness in the eyes of the jury. G.S. 1-180.

APPEAL by defendant from *Rudisill, J.*, December Term, 1949, of CALDWELL.

Criminal prosecution on warrant dated 1 August, 1949, charging the defendant with willful neglect and refusal to provide medical attention for the birth of an illegitimate child begotten by him upon the body of Madge Bolick and refusing to support said illegitimate child after its birth, 25 June, 1949.

The defendant entered a plea of not guilty, denying paternity and any liability for the support of the subject child. There was evidence from the prosecutrix tending to support the allegations of the warrant.

The defendant offered a witness, Lloyd Teasley, who testified that he had sexual intercourse with the prosecutrix five or six times during the year 1948, but that he didn't think he was the father of her child.

Immediately upon leaving the witness stand and in the presence of the jury, the judge ordered the sheriff "to take the witness Teasley into his custody," without assigning any reason therefor. Objection by defendant.

Verdict: Guilty.

Judgment: Six months on the roads, suspended on conditions stated.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Moody and Walter F. Brinkley, Member of Staff, for the State.

Max C. Wilson and Hal B. Adams for defendant.

STACY, C. J. The principal question for decision is whether the court prejudiced the defendant's case by ordering his witness into custody in the presence of the jury without assigning any reason therefor.

It is freely conceded that the court may not impeach or disparage the testimony of a material witness for the defendant in a criminal prosecution. The authorities are to the effect that no judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a

witness or to impeach his credibility. G.S. 1-180; *S. v. Perry, ante,* 467; *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *S. v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378; *S. v. Auston,* 223 N.C. 203, 25 S.E. 2d 613; *S. v. Buchanan,* 216 N.C. 34, 3 S.E. 2d 273; *S. v. Winckler,* 210 N.C. 556, 187 S.E. 792; *S. v. Rhinehart,* 209 N.C. 150, 183 S.E. 388; *S. v. Bryant,* 189 N.C. 112, 126 S.E. 107; *Morris v. Kramer,* 182 N.C. 87, 108 S.E. 381; *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855; *S. v. Dick,* 60 N.C. 440.

Undoubtedly, the jury must have concluded that the court thought the witness was guilty of perjury or of criminal relations with a female juvenile, either of which, we apprehend, was calculated to weaken his testimony in the eyes of the jury. *S. v. Swink,* 151 N.C. 726, 66 S.E. 448, 19 Ann. Cas. 422. There is no suggestion of any contumacy on the part of the witness. *S. v. Slagle,* 182 N.C. 894, 109 S.E. 844; *Seawell v. R. R.,* 132 N.C. 856, 44 S.E. 610; 53 Am. Jur. 82. Nor do we think the later instruction to the jury to banish the incident from their minds cured the defect. *S. v. Winckler, supra; S. v. Bryant, supra; Morris v. Kramer, supra;* 53 Amr. Jur. 85.

Presumably, the verdict is sufficient in form to fix the paternity of the child. *S. v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9. As to this, however, we express no opinion since the case is to be sent back. *S. v. Spillman,* 210 N.C. 271, 186 S.E. 322.

New trial.

R. E. BENGEL, SR., v. HARVEY L. BARNES AND MAOLA MILK & ICE CREAM COMPANY, INC.

(Filed 29 March, 1950.)

Deeds § 16b—

Where the evidence discloses that business enterprises had invaded the subdivision in question with the acquiescence of those owning lots therein, and had so changed the character of the neighborhood as to make it impossible to accomplish the purpose intended by the restrictive covenants, nonsuit is properly entered in a suit to restrain defendants from violating covenants restricting the use of the property to residences.

APPEAL by plaintiff from *Parker, J.,* at the November Term, 1949, of CRAVEN.

The plaintiff, who owns lots in a certain subdivision in New Bern, North Carolina, sued for an injunction to restrain the defendants from erecting a proposed business structure upon other lots in the subdivision owned by them on the theory that such lots were subject to restrictive covenants limiting their use to residence purposes. The action was dis-

missed in the court below upon an involuntary judgment of nonsuit, and the plaintiff appealed, assigning such ruling as error.

Charles L. Abernethy, Jr., for plaintiff, appellant.

R. E. Whitehurst and George B. Riddle, Jr., for defendants, appellants.

PER CURIAM. For the purpose of this particular appeal, it is taken for granted without so deciding that the deeds to the predecessors in title of the parties to the action contain covenants limiting the use of the property described in them to residences, and that these restrictive covenants were placed in the deeds pursuant to a general plan to develop the entire subdivision as a restricted residential neighborhood. Notwithstanding this assumption, the compulsory nonsuit was proper. This is true because the testimony of plaintiff at the trial showed that business enterprises invaded the subdivision after its establishment with the acquiescence of those owning lots therein, and so changed the character of the neighborhood as to make it impossible to accomplish the purpose intended by the restrictive covenants. *Starkey v. Gardner,* 194 N.C. 74, 138 S.E. 408, 54 A.L.R. 806.

The involuntary judgment of nonsuit is

Affirmed.

J. B. JAMES, EXECR., v. LOUISE HARRIS ROGERS ET AL.

(Filed 29 March, 1950.)

Appeal and Error § 38—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by Estelle Harris Bunting and husband and Margaret Harris Hice and husband from *Bone, J.,* February Term, 1950, of PITT.

Proceeding under Declaratory Judgment Act to determine rights of devisees under a will.

R. E. Harris, Jr., late of Pitt County, at the time of making his will on 25 September, 1945, owned a one-fourth undivided interest in a tobacco warehouse in Greenville. This he devised to his sister, Louise Harris Rogers, describing it as all of his right, title and interest therein. Thereafter he acquired by purchase an additional one-fourth interest in the warehouse and died November, 1948, seized and possessed of two-fourths or one-half undivided interest therein.

The trial court held that Louise Harris Rogers took what the testator owned in the warehouse at his death rather than what he owned therein at the time of making of his will.

From this declaration and judgment the testator's other sisters and their husbands appeal, assigning error.

No counsel of record for plaintiff.

Marshall T. Spears and Lewis G. Cooper for defendants, appellants.

Albion Dunn for defendants, appellees.

PER CURIAM. One member of the Court, *Barnhill, J.*, not sitting, and the remaining six being evenly divided in opinion in respect of the correctness of the declaration of the court below, the judgment of the Superior Court stands affirmed after the manner of the usual practice in such cases, and as the disposition of the appeal, without becoming a precedent. *Smith v. Furniture Co.*, 221 N.C. 536, 19 S.E. 2d 17; *Howard v. Coach Co.*, 216 N.C. 799, 4 S.E. 2d 499; *Elmore v. General Amusements*, 221 N.C. 535, 19 S.E. 2d 5; *Gardner v. McDonald*, 223 N.C. 854, 25 S.E. 2d 397.

Affirmed.

W. L. SUTTON AND WIFE, ANNIE FIELDS SUTTON, v. DAN QUINERLY AND WIFE, MABEL B. QUINERLY; W. H. HICKSON AND WIFE, LENA P. HICKSON; C. G. CRADDOCK AND WIFE, CORA A. CRADDOCK; AND W. C. FIELDS AND WIFE, BETTIE TULL FIELDS.

CASE REFERRED TO HERE AS NO. ONE.

W. L. SUTTON AND WIFE, ANNIE FIELDS SUTTON, v. C. G. CRADDOCK AND WIFE, CORA A. CRADDOCK; DAN QUINERLY AND WIFE, MABEL B. QUINERLY; W. H. HICKSON AND WIFE, LENA P. HICKSON; AND W. C. FIELDS AND WIFE, BETTIE TULL FIELDS.

CASE REFERRED TO HERE AS NO. TWO.

W. L. SUTTON AND WIFE, ANNIE FIELDS SUTTON, v. W. C. FIELDS AND WIFE, BETTIE TULL FIELDS; W. H. HICKSON AND WIFE, LENA P. HICKSON; DAN QUINERLY AND WIFE, MABEL B. QUINERLY; AND C. G. CRADDOCK AND WIFE, CORA A. CRADDOCK.

CASE REFERRED TO HERE AS NO. THREE.

W. L. SUTTON AND WIFE, ANNIE FIELDS SUTTON, v. DAN QUINERLY AND WIFE, MABEL B. QUINERLY; W. H. HICKSON AND WIFE, LENA P. HICKSON; W. C. FIELDS AND WIFE, BETTIE TULL FIELDS; AND C. G. CRADDOCK AND WIFE, CORA A. CRADDOCK.

CASE REFERRED TO HERE AS NO. FOUR.

W. L. SUTTON AND WIFE, ANNIE FIELDS SUTTON, v. MABEL B. QUINERLY; CORA A. CRADDOCK; JOHN HICKSON AND WIFE, THELMA JENKINS HICKSON; LOIS HICKSON SCOTT AND HUSBAND, K. D. SCOTT; WILLIAM F. HICKSON AND WIFE, MARGARET COUCH HICKSON; EDWARD B. HICKSON; ROBERT W. HICKSON; PHILIP H. HICKSON AND WIFE, WINAFRED ALLEN HICKSON; ANN HICKSON BOWEN AND HUSBAND, HARRY BOWEN; JAMES F. HICKSON, AND RICHARD C. HICKSON; AND FRANCES FIELDS HOLLIDAY AND HUSBAND, JOSEPH W. HOLLIDAY.

CASE REFERRED TO HERE AS NO. FIVE.

(Filed 12 April, 1950.)

1. Judgments § 32—

Where successive proceedings are instituted for the sale of separate parcels of real property devised *en masse* in a single item of a will and it appears that the parties to all the proceedings are the same or are privies to deceased parties, *held* an adjudication of the respective rights of the parties in the property is *res judicata* even though only a part of the property was involved at the time of the rendition of the judgment, since title to all the lands devised by the single item of the will hangs upon the same thread.

2. Appeal and Error § 8—

An appeal will be determined in accordance with the theory of trial in the lower court.

3. Wills §§ 32, 38—

The rule against partial intestacy is not one of public policy, but is to be employed solely for the purpose of ascertaining the intent of testator, and therefore it cannot operate to throw into a residuary clause (expressly limited to property not disposed of in prior devises) the remainder after a life estate when it is apparent from the construction of the entire instrument that testator intended to dispose of such remainder in the same item which created the life estate.

4. Wills § 31—

The intent of testator is his will, and such intent will be gathered from the four corners of the instrument, and to this end the court may transfer words and phrases to prevent the clear intention of testator from being defeated by inept use of language.

5. Wills § 33g—Where devise is for life with remainder to life tenant's children, but if she "does not marry" then to her surviving brother and sisters, held marriage of life tenant does not defeat limitation over.

By parallel devises to each of his children testator directed that his child should take a life estate and "after her death, if she shall have married and borne children (or a child) by such marriage, I give, devise and bequeath said lands . . . to such child or children—and, if she does not marry, I give, devise and bequeath" said lands to her brother or sisters her surviving. *Held:* The contingency upon which the remainder was to vest in the brother or sisters surviving the life tenant was the death of the

life tenant without surviving child of her marriage, and it was not the intent of testator that the subsequent marriage of the life tenant should defeat the limitation over to her surviving brother and sisters, and *held further*, the devise makes complete disposition of the property leaving no contingent interest to fall into the residuary clause.

PETITIONERS' appeal from *Grady, Emergency Judge,* November 1949 Civil Term, LENOIR Superior Court.

This appeal, captioned as above, more immediately concerns the petition of John Hickson *et als.*, filed in Lenoir Superior Court August 26, 1949, and the adverse judgment of Grady, J., from which the appeal was taken.

The petition, both in its caption and the body, sets forth a number of proceedings for the sale of the lands devised in Item 5th of the Will of William C. Fields, Sr., deceased, which were from time to time consolidated by order of the court, for the purposes stated in the record, into "one case." From the proceedings which form the background of the controversy under review we draw in condensed form the factual history and legal implications and the rationale of decision, with such detailed elaboration as may be necessary.

William C. Fields, Sr., died in 1902, leaving a last will and testament in which he made provision for his five children, married and unmarried: Lena P. Hickson, Mabel B. Quinerly, Annie C. Fields, William C. Fields, Jr., and Cora Agnes Fields; and for his grandchildren *in esse* and yet to be born, with contingent devise as further appears *infra*. The present controversy concerns the disposition of the remainder in fee of the property devised in Item 5th after the life estate of Annie C. Fields; and, therefore, the proper construction of this item of the Fields will.

Item 5th of the will reads as follows:

> "I loan to my daughter Annie C. Fields, the following lots and lands: The lot on which stands the Farmers Warehouse—corner of Heritage and Gordon Streets—being about 110 x 190 feet—the lot on which Geo. Herring now lives adjoining the lot of H. D. Spain—(on Queen Street)—and the lot now occupied by J. A. Long—being about 55 or 60 feet front by 210 deep. The vacant lot next to the lot in which Tom Cox now lives on East side of Independence street, between Washington and Lenoir Streets—being about 20 x 200 feet. The vacant square or lot on west side of W. &. W. Rail Road, about 132 x 265 feet adjoining lots formerly belonged to L. Harvey on the west and Mrs. Lillian Perry on the south and the W. & W. Rail Road on the east—The tract of land—about 350 acres in Vance Township known as 'Moore Dale' on which Josh Mewborn now lives, during the term of her natural life and, after her death, if she shall have mar-

ried and borne children (or a child) by such marriage, I give, devise and bequeath said lands—and lots to such child or children—and, if she does not marry, I give, devise and bequeath said lots and lands to her brother or sisters who may survive her to them, their heirs and assigns."

Item 8th of the will reads as follows:

"I give and devise to my children Lena P. Hickson, Annie C. Fields, Mabel B. Quinerly, Wm. C. Fields, Jr. and Cora A. Fields all the real estate which I may own, or in which I may have an interest (not included in the devises above,—at the time of my death, to be equally divided among them—share and share alike. And in all cases where I have—given options to tenants or others, in writing, to purchase any of the lots or lands embraced in either of the devises above set forth, and such option holder desires to comply with the terms of such option, it is my will and desire that the child or children to whom such lands or lots are loaned shall execute a deed, in fee simple, to the purchaser and that such deed shall convey a perfect title to said land or lots."

Subsequent to the death of W. C. Fields, Sr., Lena P. Hickson died, leaving surviving her nine children, now petitioning; and in October, 1946, William C. Fields, Jr., died, leaving one child, Frances Fields Holliday, also a party to the petition.

Subsequent to the death of W. C. Fields, Sr., Annie Fields married W. L. Sutton, and Cora Fields married C. S. Craddock. Annie Fields Sutton died in July, 1949. Cora Craddock and Mabel Quinerly are the only children of W. C. Fields surviving Annie.

Beginning with August 5, 1916, and down to August 1, 1947, inclusive, five successive, independent proceedings were brought in the name of W. L. Sutton and wife, Annie Fields Sutton, for the sale of separate parts of the land described in Item 5th of the will, and in each instance the sales were decreed, made and confirmed, and the proceeds placed in the hands of a commissioner of the court to hold for future distribution. To facilitate the administration of the proceeds as one fund, the proceedings, having reached four in number, were consolidated; and after subsequent terms of court the last named proceeding designated as "Case Number Five" was consolidated with the others as "one case." The main purpose of each proceeding, as stated, was to make sale of the particular part of the property described in Item 5th and upon this all of the parties to the proceedings agreed.

In the proceeding designated as Case No. Five, like all the others, a petition to sell a part of the lands devised under Item 5th (the petitioner

is Annie Fields Sutton and husband), describing the interest of the several parties therein, alleged that:

> "The ownership of the remainder interest in said land is contingent awaiting the death of the plaintiff Annie Fields Sutton, by which event only can the ownership of said remainder interest be made certain and known, unless it be that because of the marriage of the said plaintiff Annie Fields Sutton, Item Five of the will of W. C. Fields, deceased, should be construed as a provision whereby the said tract of land goes in fee to the heirs at law of said testator, W. C. Fields, deceased."

In a further defense Cora Craddock, admitting the necessity of the sale, denied this allegation, and averred:

> "That this answering defendant contends that the proper and legal construction of the fifth item of the will of her father, W. C. Fields, which is herein involved is that the vested remainder interest in the tract of land in question go at the death of the plaintiff Annie Fields Sutton to the brother or sisters of said plaintiff who may survive her, and that therefore if this defendant and her sister, Mabel B. Quinerly, survive the said plaintiff the said tract of land will go exclusively to them, or to either of them who may survive her; and that if neither this defendant nor the defendant Mabel B. Quinerly survives the said Annie Fields Sutton, then the said lands will go in general to the heirs at law of the said testator, W. C. Fields, deceased, under the statutes of descent as by inheritance."

John Hickson and other parties to the proceeding being the petitioner in the proceeding now under review, answered as follows:

> "These defendants say that the life tenant, Annie Fields Sutton, having married and being now the wife of the plaintiff W. L. Sutton, an event has happened which ends the contingency as to the remainder interest in the said land and, therefore, the said remainder interest has become vested in the heirs of the testator, W. C. Fields, and at present should the said Annie Fields Sutton now die, the remainder interest would be taken as by inheritance . . ."

And in their prayer for relief demanded:

> "That it be decreed that the said Annie Fields Sutton (mentioned in the will as 'Annie C. Fields') having married, the fifth item of the will devise nothing except a life estate to her, the marriage of said plaintiff having converted the contingent remainder interest under

said item to a remainder estate of inheritance by the heirs at law of W. C. Fields, deceased . . ."

And the parties respectively asked for judgment in accord with their construction of Item 5th of the will.

The judgment in the Superior Court ordering the sale of the property designated the interests of the parties therein as follows:

"That the plaintiff Annie Fields Sutton owns an estate in said land for and during the term of her natural life, and the ownership of the remainder interest therein is contingent awaiting the death of the plaintiff, Annie Fields Sutton, by which event only can the ownership of said remainder interest be made certain and known. That at the death of the said Annie Fields Sutton the said land will go in fee to the defendants Mabel B. Quinerly or Cora A. Craddock, if only one shall survive the said Annie Fields Sutton. If neither of said defendants shall survive the said Annie Fields Sutton, then said land will go in remainder in fee to the heirs at law of the said W. C. Fields, deceased, the testator, in fee simple by inheritance."

From this portion of the said judgment the parties other than Mabel B. Quinerly and Cora A. Craddock appealed to the Superior Court. The matter was heard by Judge Luther Hamilton at September Term, 1947, of Lenoir Superior Court, who, after finding facts, rendered judgment to the effect "that the adjudication as to the title made by the lower court is correct and proper in law and therefore said judgment is in all respects affirmed, both as to findings of fact and conclusions of law."

The defendants, except Mabel B. Quinerly and Cora A. Craddock to whom the judgment was favorable, excepted and appealed to the Supreme Court.

Thereafter the appeal was heard and opinion and decision filed therein 29 October 1947 and subsequently entered with the records of the Superior Court of Lenoir County by Williams, J. *Sutton v. Quinerly,* 228 N.C. 106, 44 S.E. 2d 521.

Subsequently an order of court was made consolidating this proceeding with the other four proceedings, all five consolidated proceedings to be known as "one case."

The petition under review, as indicated by its caption, is "for the construction of Item 5th of the will of William C. Fields, Sr., deceased." It includes in its body reference to the various proceedings as Cases One to Five and refers by letter and page to the judgment docket in Lenoir County where they may be found, and also includes reference to the judgment roll in each of the proceedings above enumerated. It alleges

that the proceeds of the various sales above mentioned have accumulated until there is now $37,297.10 in the hands of the commissioner of the court, Leo H. Harvey, and that certain property described in Item 5th remains unsold, of the value as contended of $25,000. It questions no part of the proceedings theretofore had except the construction of Item 5th of the will; and as to this demand judgment in accordance with the construction placed by the petitioners thereupon.

The petition was answered by Mabel B. Quinerly and Cora A. Craddock who allege that under the terms of the will and those contingencies which have been resolved they are the sole owners of the property in controversy, one-half each, as the only children of William C. Fields, Sr., surviving their sister, Annie Fields Sutton.

In a further answer and as a plea in bar to the relief sought in the petition, they allege and plead that the petitioners are estopped from setting up any right, title or interest to the lands involved in this controversy, or the proceeds of any sales thereof, particularly referring in support of said plea to all the judgment rolls appearing in the record in said proceedings, and especially the judgment rendered by Judge Hamilton in Case No. Five, and the opinion, decision and judgment of the Supreme Court, on appeal from Judge Hamilton, reported in *Sutton v. Quinerly, supra,* and duly filed in the records of the Superior Court of Lenoir County, all of which they contend operates as *res judicata.* They also aver that irrespective of such estoppel, under the correct interpretation of Item 5th of the will and the facts which have transpired with reference to the contingency therein, the answering defendants Cora Craddock and Mabel Quinerly are the sole owners of the disputed properties.

The matter came before Judge Grady at November Term, 1949, of Lenoir County Superior Court, who, on the hearing of the matter and full argument, found the facts, made his conclusions of law, and entered his judgment as follows:

"That Mabel B. Quinerly and Cora A. Craddock, the only sisters surviving Annie Fields Sutton, deceased, the life tenant, are owners in equal shares of all the funds in the hands of the Commissioner, and representing the proceeds of sale of said lands, devised under Item Five of the will of William C. Fields, Sr., deceased, and that they are seized and entitled to the immediate possession of a fee simple estate in and to the remaining lands described and devised in Item Five of the will; and that the petitioners have no interest in said funds and no interest in any remaining lands described and devised under Item Five."

The judgment then authorized and directed Leo H. Harvey, Commissioner of the Court, to file a complete and final accounting of his commissionership of said funds, and pay over and deliver to the said Mabel

B. Quinerly and Cora A. Craddock, share and share alike, "all monies, notes, or investments in his hands as Commissioner of the Court representing the proceeds of sale of the lands devised under Item Five of said will or any investments of the proceeds of sale made by said Commissioner under previous orders of the Court."

The petitioners excepted and appealed, assigning errors.

John G. Dawson and Varser, McIntyre & Henry for petitioners, appellants.

Whitaker & Jeffress and Hugh Dortch for respondents, appellees.

SEAWELL, J. The principal assignments of error fall into two classes: Objections to the interpretation Judge Grady gave to the orders of consolidation as being too broad, thereby "spreading" his conception of the devise in Item 5th of the will, and possibly the effectiveness of the plea of *res judicata* over all the proceedings so consolidated; and those designed to preserve the contention that appellants are devisees under the will. We do not find it necessary to discuss the first class in detail since it seems clear that if the purpose was only to facilitate the handling of the funds and conserve them for distribution, that purpose is sufficient to include all matters affecting the rights of those contending themselves to be distributees; and whether the proceedings be considered in the aggregate or as discrete transactions, it would not affect the plea in bar if found applicable.

It appears from the record and by reference to the judgment rolls therein that from the beginning of the litigation and through all of the consolidated proceedings the litigating parties are either identical or privies in interest as successors of former parties, and privies to such judicial determination of right as pertains to the subject matter dealt with in the decision of *Sutton v. Quinerly,* 228 N.C. 106, 44 S.E. 2d 521, including such rights as it was the duty of the parties to plead or assert in that cause as essential to the final determination of the controversy. The same identity of parties and privies where death has removed some of the parties and substituted others in the same interest appears now in the case before us for decision; and the subject matter is the same: The property devised in Item 5th of the will to Annie C. Fields for life, with contingent remainder in fee to others; which carries with it the disputed disposition of the remainder in fee on resolution of the contingency.

True, when the case reported *sub nomine Sutton v. Quinerly supra,* was before us only a part of that property was involved in the petition for sale and the incidental construction of the will. But the property described in Item 5th was devised integrally and the title to every part

of it hangs upon the same thread. Its potentiality of infinite physical subdivision could not so affect the principle of *res judicata* as to make a hundred suits necessary to estoppel.

The identity of parties and privies and of subject matter in the several judgment rolls set out in the record, with those in the cited case of *Sutton v. Quinerly,* all within the scope of the judgment in that case exhibited in the record, is sufficient to sustain the plea of *res judicata* and estoppel invoked by the appellees.

But whether we deal with *res judicata* or its little brother in principle, "the law of the case," the appellants insist that *Sutton v. Quinerly* is so outstandingly erroneous in its construction of the will as to justify the Court in relaxing the rigidity of either rule, by exception and correction. The gist of the grievance against *Sutton v. Quinerly* is that the Court missed the real point at issue and indulged in improvident discussion of the rule against intestacy, whereas it was obvious that the fee-remainder passed as a testate provision under a residuary clause,—referring to Item 8th of the will quoted *supra.*

Counsel may ignore it, but cannot expect the Court to be oblivious to the fact that since *Sutton v. Quinerly* was decided here on appeal the present appellants have executed a complete about-face respecting their claim to the property, and are in process of changing horses in the middle of the stream. In *Sutton v. Quinerly* they made no claim, either in the lower court or here on appeal, that they were entitled to the property under the residuary clause as testate beneficiaries; but on the contrary claimed that W. C. Fields failed to pass the remainder in fee by his devise in Item 5th of the will *and died intestate* as to that interest, claiming exclusively by inheritance from W. C. Fields, Sr. See "Records and Briefs, Fall Term, 1947, 6-15," where, in their brief, they present it as the only question before the Court.

It is the custom of reviewing courts to consider cases within the frame of the appeal and to give consideration to the basis of the claim presented rather than, *ex mero motu,* to force litigants into a position which they have regarded as less strategic.

We may examine the case from this new angle without reference to the prior adjudication. It does not necessarily change the result or the reasoning by which it was reached. The appellants still have to hurdle the dispositive language used in Item 5th contended by them to fall short of the devise of the remainder in fee, as well as the restricting language of the residuary item, (a particular, not a general residuary clause), which they contend carries a testamentary devise of the subject interest to them.

The rule against partial intestacy is not one of public policy, operating regardless of intent, or in contradiction of manifest intent, but an aid

to finding the intent when the meaning is unclear. It is based on experience, reason and a recognition of normal human conduct in the area of its application. Analogous reasoning may be safely applied to the instant question: Whether William C. Fields has, within the confines of Item 5th, completed the devise of all his interest in the subject property, or, because of the nature of the contingency, has left the remainder interest undevised therein.

For the purpose of testamentary disposition Fields made a mental division of his extensive real property, and put these parts, so to speak, in separate cubicles of his will, in which, respectively, the five living children were the first objects of his bounty, and next in importance were the grandchildren, some of them already born to married children, and others possibly to be born to others at that time unmarried. One of these cubicles is Item 5th, the immediate subject of this controversy. There are four other similar items in which the problem of disposition is, upon the face of them, similarly worked out with regard to the other four children.

The manner of dealing with the subject matter is strongly persuasive of the intention to complete the devise of the property in Item 5th of the will in the disposing formula there used.

Is it reasonable to suppose that Fields, having come down to the disposition of the property included in this Item, and having given to Annie a life estate therein, and having undertaken to deal with the remainder in fee, failed to carry through the business and let it slip from his hands unfinished, *dum fovet opus,* either into the statute of descent and distribution or the catch-all of a doubtful residuary clause? That sort of thing is not easily explained by reference to a residuary clause when we are looking for the intent where it ought to be found, (if the testator could keep his affections in mind long enough), rather than for a mere legal effect, which neither loves nor remembers.

A closer look at the language used in the devise bears this out. *The devise is in sequence, in one compound sentence written in parallel construction, the parts of which are obviously so related as to be complementary and must be construed together to make a complete sentence.*

The appellants, as stated, contend that the negative branch of the sentence, *i.e.,* ". . . if she does not marry . . ." expresses the entire contingency on which the succession of the sisters Quinerly and Craddock, the appellees, depend; that it stands alone without necessity of construction, and without reference to the other limb of the sentence or closely associated context. "It is so written." This sort of dichotomy does not reflect the common sense theory of construction and does not satisfy the other rules we are constrained to apply.

The intent of the will is to be gotten from its four corners, *Trust Co. v. Shelton,* 229 N.C. 150, 48 S.E. 2d 41; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247. And the intent is the will. *Jarrett v. Green,* 230 N.C. 104. Certainly a part of the same sentence dealing with the same subject may be consulted to find the real meaning and intent of an expressed condition which, unexplained, would otherwise be unusual, arbitrary and unique in the scheme of disposition.

We cannot assent to the view that the maker of this will, having carefully provided for the succession of his grandchild, or grandchildren to the fee in case Annie married, would, in the same breath nullify that possibility and disinherit his grandchildren solely because she married. It involves an absurdity which justifies the Court in clarifying the whole sentence, in order to find a reasonable intent. 57 Am. Jur., Wills, 1127, 1129: "The inconvenience or absurdity of a devise is no ground for varying the construction where the terms are unambiguous. But when the intention is obscured by conflicting expressions, it is to be sought in a rational and consistent rather than in an irrational and inconsistent purpose." *Graham v. Graham,* 23 W.Va. 36, 40 Am. Rep. 334; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888; *Williams v. Rand, supra; Pilley v. Sullivan,* 182 N.C. 493, 109 S.E. 539.

The conclusion is inescapable that Fields did not intend to make two distinct contingencies, contradictory to each other, the last destroying the first. To him the failure to marry meant the failure of issue born to any marriage which Annie might contract, and was intended to be an alternative statement of the contingency, meaning that if Annie did not have issue by marriage, (to whom in that event he had already devised the property), the remainder should then go to the brother or sisters who should survive the holder of the life estate; and the Court is justified in reading that construction into the will. In *Gordon v. Ehringhaus,* 190 N.C. 147, 129 S.E. 187, it is said: "In performing the office of construction the Court may reject, supply or transpose words and phrases in order to ascertain the correct meaning and to prevent the real intention of the testator from being rendered aborted by his inept use of language," citing *Carroll v. Mfg. Co.,* 180 N.C. 366, 104 S.E. 895, and *Tayloe v. Johnson,* 63 N.C. 381; *Williams v. Rand, supra.* Only by such construction could harmony be brought into the dispository language and bring out what we conceive and hold to be its intent.

In view of the conclusion we have reached, it is not necessary to burden the residuary clause, at most of doubtful receptivity, or the statute of descent and distribution, with an estate sufficiently limited and devised when first dealt with in the will.

For the reasons stated we find the proceeding in the court below free from error, and the judgment must be

Affirmed.

NEALIE COOPER GRAHAM v. NORTH CAROLINA BUTANE GAS CO.,
and
JAMES NEAL GRAHAM v. NORTH CAROLINA BUTANE GAS CO.

(Filed 12 April, 1950.)

1. Trial § 19—

The competency, admissibility and sufficiency of the evidence are for the court; the credibility, probative force and weight of the testimony are for the jury.

2. Trial § 21—

A motion to nonsuit challenges the legal sufficiency of the evidence to take the case to the jury, admitting for the purpose the truth of all facts in evidence tending to sustain plaintiffs' claim and every reasonable inference therefrom.

3. Trial § 23a—

Compulsory nonsuit cannot properly be entered if the facts are in dispute, or if the testimony in relation to the facts is such that different conclusions may reasonably be reached thereon.

4. Master and Servant § 22a—

In order to hold the employer liable for the negligence of the employee it must be made to appear (1) that the employee was negligent, (2) that the negligence of the employee was the proximate cause of the injury, and (3) that the relation of master and servant existed between the employer and the employee at the time of and in respect to the very transaction out of which the injury arose.

5. Gas § 1—

Fuel gas is an inherently dangerous substance and a merchandiser thereof must use that degree of care which an ordinarily prudent person would exercise under like circumstances in managing such a dangerous agency.

6. Gas § 2—

A gas company is liable in damages for negligence in failing to employ reasonable care to prevent the escape of gas when such failure is the proximate cause of injury, and this rule applies to its delivery of gas to the building of a customer.

7. Same—

A gas company in delilvering gas to a customer is entitled to assume, in the absence of notice to the contrary, that fixtures which it did not install and over which it has no control, are sufficiently secure to permit gas to be introduced into the building with safety; but if it becomes aware that gas is escaping from such fixtures, it has the duty to shut off the gas supply until further escape from the fixtures can be prevented, and if it continues to transfer gas into the fixtures after it learns that gas is escaping therefrom, it does so at its own risk, and is liable for any injury proximately resulting therefrom.

8. Same—Evidence held sufficient to support finding that deliveryman was negligent in discharge of very duty he was entrusted to perform by gas company.

Evidence that defendant gas company's deliveryman, while replenishing the supply of gas in plaintiffs' storage tank, was advised that gas was leaking from plaintiffs' fixture, that the driver thereafter continued to deliver the amount of gas ordered into the storage tank and then went into plaintiffs' kitchen with a flame in his hand to light the pilot light, and thus prevent the further escape of gas, *is held* sufficient to overrule the gas company's motion to nonsuit in an action to recover for injuries resulting from the ensuing explosion and destruction of plaintiffs' property by fire, since it is sufficient to warrant the findings that the driver was negligent in the discharge of the duty entrusted to him by defendant to deliver the gas, and that such negligence was the proximate cause of the injury.

STACY, C. J., took no part in the consideration or decision of this case.

APPEALS by plaintiffs from *Williams, J.*, at September Term, 1949, of SAMPSON.

The plaintiffs, Nealie Cooper Graham and James Neal Graham, brought separate actions against the defendant, the North Carolina Butane Gas Company, a corporation engaged in selling and distributing fuel gas, claiming damages for the total destruction of a dwelling house and its contents by a fire alleged to have been occasioned by the negligence of the defendant in supplying gas to such house for cooking purposes. The two actions were tried together by consent.

The dwelling was located near Clinton in Sampson County, North Carolina. It belonged to Nealie Cooper Graham, but was occupied by her son, James Neal Graham, and his immediate family. The kitchen equipment included a gas range, which had four gas burners and a pilot light, and which was designed to use butane gas for fuel. The stove was supplied with gas by means of a service pipe connecting it with a storage tank situated in the yard adjacent to the house. This storage tank was fitted with a stop-cock or cut-off valve for stopping the flow of gas through the pipe to the range. The cooking system had been installed two years previously, had been in constant use since that time, and had always operated in an effective manner. On 13 April, 1948, one Lee, the defendant's employee, whose duty it was to deliver gas to the defendant's customers, drove the tank truck of the defendant to the premises of the plaintiffs for the purpose of transferring 50 gallons of butane gas from such tank truck to the storage tank, which was then empty.

Two witnesses for plaintiffs, to wit, James Neal Graham and his wife, gave virtually identical evidence as to ensuing events. Arranged in its chronological order, the material testimony of the former was as follows:

"On April 13, 1948, Mr. Lee delivered some butane gas to the storage tank. That was the first gas that I ever bought from the defendant.

Mr. Lee had never seen the house or stove before. The pilot light stays on all the time that there is gas in the tank. The proper thing after the gas is put back in there is to light the pilot light, and if you don't light it the gas from the tank will escape in the kitchen. If Mr. Lee had filled up the tank, and I had failed to light the pilot light the kitchen would have gotten full of gas. Before Mr. Lee connected his hose to the tank, he told me to go in the house, and cut off all the units and light the pilot light. I went in the house. All the burners were off. I tried to light the pilot light, but it didn't light. I could smell gas in the kitchen. When I tried to light the pilot light, it flared up to the ceiling, and I came out in the yard where Mr. Lee was putting gas in the tank, and told Mr. Lee that the pilot light was blowing gas to the ceiling, that I could smell it and could hear it hissing through that jet in the pilot light, and that something was wrong with the stove, and I didn't know what to do about it. Mr. Lee hadn't finished putting gas in the tank, and he told me to wait until he finished putting the 50 gallons in, and that he would go in there and check it for me. I stayed by him until he finished putting gas into the tank. After he finished putting gas into the tank, he went into the house, and asked me to show him how the pilot gas blew off. I tried to show him, and it did the same thing. The light flared up, but it didn't stay lit. Then Mr. Lee took a screwdriver and a cigarette lighter and tried it, and the pilot light did the same thing with him. He tried to adjust the adjustment on the light, and it blew and flared up higher at the ceiling. My wife was standing there, and she asked Mr. Lee if he didn't think that he ought to cut it off on the tank until it could be fixed, that there was something wrong. A little spark jumped from the pilot light to the master burner, and he asked my wife if she saw that, and she said she did. Then Mr. Lee reached over and turned the master burner on, and the kitchen exploded in flame, and there was fire all over the kitchen. When he turned the master burner on, Mr. Lee had a cigarette lighter in his hand lit. After the fire broke out we all ran out of the kitchen, and Mr. Lee cut the valve off at the tank on the outside. The fire spread across the back porch, and through the main hallway of the house, and burned the house and all of the personal property in the house."

The plaintiff, James Neal Graham, made this admission on cross-examination: "The purpose of my sending for Mr. Lee . . . was to bring some butane gas. I did not send for the Butane Gas Company or Mr. Lee to come and fix the stove. As far as I knew, there was nothing wrong with the stove." Moreover, the defendant elicited this testimony from the witness Mrs. James Neal Graham: "I knew that Mr. Lee was a truck driver, delivering the gas, but I did not know whether he was a mechanic.

I first asked him if he could fix it, and he said no, but he went into the house to do it. He went in there to help do what he could, I reckon."

When the plaintiffs had introduced their evidence and rested, the court allowed motions of the defendants for compulsory nonsuits under G.S. 1-183, and entered judgments accordingly. The plaintiffs excepted and appealed, assigning these rulings as error.

A. McL. Graham, F. Ogden Parker, and Warlick & Ellis for plaintiffs, appellants.

Butler & Butler for defendant, appellee.

ERVIN, J. On the trial of an action, the competency, admissibility, and sufficiency of the evidence are for the court while the credibility of the witnesses, and the probative force and weight of the testimony are for the jury. *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341.

A motion for a compulsory nonsuit under the statute now codified as G.S. 1-183 challenges the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316; *Lea v. Bridgeman,* 228 N.C. 565, 46 S.E. 2d 555; *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463. When the defendant moves for a compulsory nonsuit, he admits, for the purpose of the motion, the truth of all facts in evidence tending to sustain the plaintiff's claim; and the plaintiff is entitled to have the court, in ruling on the motion, to give him the benefit of every favorable inference which the testimony fairly supports. *Higdon v. Jaffa, ante,* 242, 56 S.E. 2d 661; *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Reid v. Coach Co.,* 215 N.C. 469, 2 S.E. 2d 578, 123 A.L.R. 140. A motion for a compulsory nonsuit cannot rightly be allowed unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. 53 Am. Jur., Trial, section 299. This being true, the court cannot properly enter a compulsory nonsuit and thereby withdraw the case from the jury if the facts are in dispute, or if the testimony in relation to the facts is such that different conclusions may reasonably be reached thereon. *Cox v. Hinshaw,* 226 N.C. 700, 40 S.E. 2d 358; *Phillips v. Nessmith,* 226 N.C. 173, 37 S.E. 2d 178; *Newbern v. Leary,* 215 N.C. 134, 1 S.E. 2d 384; *Lithograph Corporation v. Clark,* 214 N.C. 400, 199 S.E. 398.

The plaintiffs seek to hold the defendant liable under the doctrine of *respondeat superior* for injury to their property allegedly caused by the negligence of Lee, the driver of the tank truck. In consequence, the appeals from the compulsory nonsuits raise the question whether the evidence introduced by plaintiffs at the trial is sufficient to establish these three propositions: (1) That Lee was negligent; (2) that the negli-

gence of Lee was the proximate cause of injury to the property of the plaintiffs; and (3) that the relation of master and servant existed between the defendant and Lee at the time of the injury, and in respect to the very transaction out of which the injury arose. *Carter v. Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586; *Walker v. Manson,* 222 N.C. 527, 23 S. E. 2d. 839.

The defendant maintains that the testimony negatives liability on alternative grounds. The defendant asserts initially that the plaintiffs owned, maintained, and controlled the gas range, and by reason thereof were responsible for its condition; that the fire and the resultant injury were caused by a leak in the gas range occasioned by the neglect of the plaintiffs to keep the range in repair, or by the failure of James Neal Graham to turn off the master burner; and that in consequence the testimony actually disproves the allegation of the plaintiffs that the destruction of their property was the result of the negligence of Lee. It is noted, in passing, that the suggestion that James Neal Graham failed to turn off the master burner runs counter to his positive testimony that "all the burners were off," which must be taken to be true in determining the propriety of the compulsory nonsuits. The defendant insists secondarily, however, that the evidence fails to make out a case for plaintiffs under the doctrine of *respondeat superior,* even if it be adequate to sustain a finding that the loss of the property was the proximate result of negligence on the part of Lee. This position is predicated on the theory that the testimony compels the single conclusion that Lee was employed by the defendant merely to deliver gas into the storage tank of the plaintiffs; that Lee stepped aside from that business to engage in an unauthorized act, *i.e.,* to repair the gas range of the plaintiffs; that any negligent conduct on Lee's part occurred in the performance of such unauthorized act; and that in consequence the relation of master and servant did not exist between the defendant and Lee in respect to the transaction out of which the injury arose, *i.e.,* the repair of the gas range.

The trial court deemed these views to be valid, and dismissed the actions on compulsory nonsuits. In so doing, it committed error, notwithstanding that the plaintiffs owned and maintained the gas range, and that Lee was authorized by the defendant merely to make delivery of its gas.

It is a scientific fact "that gas ordinarily used for fuel is so inflammable that the moment a flame is applied it will immediately ignite with an instant explosion, if it is present in any considerable volume." *Holmberg v. Jacobs,* 77 Or. 246, 150 P. 284, Ann. Cas. 1917 D, 496. This being true, such gas is a dangerous substance when it is not under control. For this reason, the law, which is ever heedful of realities when it formulates rules to govern the conduct of men, has established these principles

in respect to the liability of gas companies for injuries resulting from escaping gas:

1. A company, which deals in gas as an article of merchandise, must use reasonable care to avoid injury to others by its escape. Reasonable care is that degree of care which an ordinarily prudent person would exercise under like circumstances in managing such a dangerous agency. *Barbeau v. Buzzards Bay Gas Co.,* 308 Mass. 245, 31 N.E. 2d 522; *Moran Junior College v. Standard Oil Co. of California,* 184 Wash. 543, 52 P. 2d 342; *Barrickman v. Marion Oil Co.,* 45 W. Va. 634, 32 S.E. 327, 44 L.R.A. 92; 42 Am. Jur., Gas Companies, section 24. A gas company is answerable in damages under the principles governing liability for negligence if it fails to employ reasonable care to prevent the escape of gas, and if its failure in such respect is the proximate cause of injury to the person or property of another. 24 Am. Jur., Gas Companies, sections 20, 21, 22; 38 C.J.S., Gas, sections 40, 41, 43.

2. The general rule requiring a gas company to use reasonable care to prevent the escape of gas applies to its delivery of gas into the building of a customer. *Manning v. St. Paul Gaslight Co.,* 192 Minn. 55, 151 N.W. 423, L.R.A. 1915, 1022, Ann. Cas. 1916E, 276; 38 C.J.S., Gas, section 42.

3. Where a gas company does not install the gas fixtures in a customer's building and does not own them and has no control over them, it is in no way responsible for their condition or for their maintenance. Consequently, it has the right to act upon the assumption in the absence of notice to the contrary that such fixtures are sufficiently secure to permit gas to be introduced into the building with safety, and is not liable for an injury caused by a leak therein, of which it has no knowledge. *Triplett v. Alabama Power Co.,* 213 Ala. 190, 104 So. 248; *Milligan v. Georgia Power Co.,* 68 Ga. App. 269, 22 S.E. 2d 662. See, also, these annotations: 138 A.L.R. 871; 90 A.L.R. 1082; 47 A.L.R. 488; 29 A.L.R. 1250; and 25 A.L.R. 262.

4. Where a gas company, which is engaged in supplying gas to a customer's building, becomes aware that such gas is escaping from the gas fixtures on the premises into the building, it becomes the duty of the gas company to shut off the gas supply until the further escape of gas from the fixtures can be prevented, even though the fixtures do not belong to the company and are not in its charge or custody. If the gas company continues to transfer gas to the fixtures on the premises after it learns that the gas is escaping therefrom, it does so at its own risk, and becomes liable for any injury proximately resulting from its act in so doing. *Clare v. Bond County Gas Co.,* 356 Ill. 241, 190 N.E. 278.

This fourth proposition finds emphatic expression in *Windish v. People's Natural Gas Co.,* 248 Pa. 236, 93 A. 1003, and *Phillips v. City of*

Alexandria, 11 La. App. 228, 123 So. 510. In the *Windish Case,* the Supreme Court of Pennsylvania said: "We fully agree with the suggestion that the defendant company, even if the duty to repair the service line did not devolve upon it, could not continue to furnish gas through that service line if known to be defective without making itself liable in damages for injuries resulting therefrom"; and in the *Phillips Case,* the Court of Appeal of Louisiana declared: "Natural gas is an explosive and a highly dangerous substance, so that the city in handling it must be held to a degree of care commensurate with the danger. In view of that fact, if the employees of the city knew at the time the gas was turned into the service pipe at the curb that there was an uncapped gas opening in the house through which gas would escape, or if they became aware after it was turned on that gas was escaping into the house through such opening, and made no effort to stop the flow and protect the occupants of the house, the city, we think, would be liable, even though it did not install the plumbing or the fixtures in the house, and did not at any time connect with the piping or disconnect therefrom any plumbing fixtures."

When the evidence is taken to be true and is interpreted favorably to plaintiffs in the light of these legal principles, it is adequate to support these conclusions:

When the defendant employed Lee to deliver the 50 gallons of gas, it necessarily delegated to him the performance of its duty to use reasonable care to prevent the escape of such gas during the course of delivery. While Lee was transferring the gas from the tank truck of the defendant to the storage tank of the plaintiffs, he acquired knowledge that the gas was escaping through the gas range of the plaintiffs, and was concentrating in heavy volume in the kitchen. Despite this knowledge, Lee did not shut off the gas supply until the further escape of the gas from the gas range could be prevented, but, on the contrary, continued to introduce the gas into the house of the plaintiffs until the last of the 50 gallons had been transferred from the tank truck to the storage tank. He then entered the kitchen with a flame in his hand to light the pilot light, and thus prevent any further escape of the gas, which he was employed to deliver. The explosion, fire, and consequent destruction of the property of the plaintiffs ensued.

Hence, it appears that the testimony is sufficient to warrant findings that Lee was negligent in the performance of the very mission assigned to him by the defendant, *i.e.,* the delivery of the gas; and that his negligence in this respect was the proximate cause of injury to the property of the plaintiffs. This being true, the compulsory nonsuits are

Reversed.

STACY, C. J., took no part in the consideration or decision of this case.

FIRST NATIONAL BANK OF SALISBURY, N. C., v. BEULAH KLUTTZ BRAWLEY, VIVIAN BRAWLEY, EDMUND BRAWLEY AND WIFE FAYE BRAWLEY, MARGARET P. BRAWLEY, INDIVIDUALLY AND AS EXECUTRIX OF ESTATE OF J. F. BRAWLEY, MARGARET LOVILL BRAWLEY CHAPMAN AND HUSBAND DON CHAPMAN, ALICE LOVILL BRAWLEY, J. FRANK BRAWLEY, LUCY JOHNSTON BRAWLEY, RUTH BRAWLEY REYNOLDS AND HUSBAND JAMES REYNOLDS, J. F. BRAWLEY AND WIFE GRACE BRAWLEY, REBA BRAWLEY WARD AND HUSBAND CARLYLE WARD, R. LOUIS BRAWLEY AND WIFE IRENE ABBOT BRAWLEY, J. W. BRAWLEY AND WIFE, MARGARET LOVILL BRAWLEY, NONA BRAWLEY BETTERLY, ROBERT V. BRAWLEY AND WIFE EMMY THORNE BRAWLEY, BOYDEN BRAWLEY AND WIFE MARGARET FAIRLEY BRAWLEY, JAMES SHOBER BRAWLEY AND WIFE LOVEDY BRAWLEY, G. M. CARL, AND ANY AND ALL OTHER PERSONS WHO CLAIM ANY RIGHT, TITLE OR INTEREST IN AND TO THE RESIDUE OF THE TESTAMENTARY TRUST OR ESTATE OF MASON H. BRAWLEY, DECEASED; AND WILLIAM C. COUGHENOUR, JR., GUARDIAN AD LITEM OF ALICE LOVILL BRAWLEY AND J. FRANK BRAWLEY, MINORS.

(Filed 12 April, 1950.)

1. Wills § 31—

A will should be construed from its four corners, giving effect, if possible, to every clause, phrase or word therein, in order to effectuate the intent of the testator as gathered from the entire instrument.

2. Wills § 34e—Specific legatees, while excluded from distribution under residuary clause, held not excluded from distributive share of residue of trust estate.

The will in question by one item bequeathed a specified sum to each of the sons of a deceased brother, stating that testator was leaving them less than their proportionate share of the estate because of their financial status; by subsequent item testator set up a trust estate with provision that the income therefrom be paid to another brother, and that so much of the *corpus* thereof should be used for his benefit as might become necessary because of prolonged illness or misfortune, with further provision for distribution of the residue of the trust estate remaining at the death of the brother to testator's next of kin *per stirpes;* followed by a residuary clause providing for distribution of the residue of the estate among testator's next of kin *per stirpes,* with further provision that "this clause" should not include distribution to the nephews first above mentioned. *Held:* While the nephews specified in the first item were excluded from the distribution under the residuary clause, such exclusion was expressly limited to "this clause" and not the will generally, and such nephews are entitled to a *per stirpes* distribution of the residue of the trust estate.

APPEAL by defendants Robert V. Brawley, Boyden Brawley, and James Shober Brawley, nephews of Mason H. Brawley, deceased, from *Armstrong, J.,* at October Term, 1949, of ROWAN.

This is an action brought pursuant to the provisions of the Uniform Declaratory Judgment Act, G.S. 1-253, *et seq.*, for the construction of three paragraphs of Mason H. Brawley's will, which read as follows:

"THIRD: I give and bequeath unto Robert V. Brawley, Boyden Brawley, and James S. Brawley, the sons of my deceased Brother, R. Vance Brawley, or the survivors of them, the sum of two thousand dollars ($2,000.00) each, the said sums to be paid over to them either in cash or its equivalent in value in securities and as soon as practicable after my death. These bequests to my said nephews, which will not represent an equal division of my estate *per stirpes,* are limited not from lack of interest or affection in and for said nephews, but are limited on account of the fact that their inheritances or legacies from other sources are abundantly sufficient to provide for their future and will be considerably in excess of the shares or legacies bequeathed by me to my other relatives, and I have full confidence that my said beloved nephews will fully understand and appreciate my motives in limiting the amounts of these their legacies.

"FOURTH: I give, bequeath and devise unto the First National Bank of Salisbury, North Carolina, the sum of Thirty Thousand Dollars ($30,000.00) in cash or its equivalent in value of securities, in the discretion of the Executors and Trustee, in trust however for the following uses and purposes and none other, to wit:

"(a) To hold, convert, sell and convey, to invest and reinvest the *corpus* or principal thereof in such stocks, bonds, and other securities and properties as shall be selected and approved, from time to time, by the said Trustee's investment committee.

"(b) To collect the income, interest and profits and to pay over the net income to my brother, W. B. Brawley, now of Mooresville, N. C., for and toward his maintenance, support and reasonable comfort, or in the event of his incapacity, then pay over the net income to other individuals or institutions whom or which the said Trustee shall deem to be proper and responsible, for and toward the support, maintenance and reasonable comfort of my said brother, W. B. Brawley, during the term of his life.

"(c) In the event the said Trustee shall at any time deem the income from this trust estate to be insufficient, then the said Trustee is fully authorized and directed to disburse from the *corpus* or principal, from time to time, such sums as it shall deem necessary to provide for the purposes aforesaid, particularly for such necessities as may arise on account of prolonged illness, accident or other misfortunes which may be suffered by my said brother and so long as such necessities shall, in the opinion of the trustee, exist; and upon the death of my said brother, then

distribute the residue of this trust estate remaining to and among my next of kin, *per stirpes.*

"(d) This trust estate herein created shall include such additions as may fall to the share of my said brother, W. B. Brawley, under other provisions of this will hereinafter stipulated.

"FIFTH: I give, bequeath and devise the residue and remainder of my estate, both real and personal wheresoever situate, unto my sisters, Mrs. J. I. Betterly, now of Spartanburg, South Carolina, and Mrs. G. M. Carl, now of Charlotte, North Carolina, and to my brothers, S. J. Brawley, now of Lander, Wyoming, W. B. Brawley, now of Mooresville, North Carolina, J. W. Brawley, now of Greensboro, North Carolina, and the children of my deceased brother, J. F. Brawley, now of Mooresville, North Carolina, *per stirpes,* that is to say that the children of my deceased brother, J. F. Brawley, shall take collectively the said deceased brother's share; and the lawful issue of any above named brother or sister now living but who shall die prior to coming into possession of their respective shares of my estate, shall take collectively his, her or their deceased parent's share, and in the event of the death of a brother or sister of mine without issue surviving to take, then the share falling to the said brother or sister shall revert and be distributed to and among the remaining shares under this item of this will. But this clause shall not be interpreted so as to include distribution or legacies to my nephews, the children of my deceased brother, R. Vance Brawley.

"The share falling to my brother, W. B. Brawley, under this item of my will shall not be paid over to my said brother but shall be added to and become a part of the trust estate hereinbefore created for the benefit of my said brother under ITEM IV of this my last will and testament."

His Honor held that the appellants are not entitled to share as next of kin *per stirpes* in the residue of the trust estate, and entered judgment accordingly. The excluded nephews appeal and assign error.

Woodson & Woodson for plaintiff, appellee.

Kerr Craige Ramsay and Clarence Kluttz for appellants.

Brooks, McLendon, Brim & Holderness for J. W. Brawley and wife, Margaret Lovill Brawley, Lucy Johnston Brawley, J. F. Brawley, Nona Brawley Betterly, R. Louis Brawley, Edmund S. Brawley, Vivian W. Brawley, Beulah K. Brawley, Ruth Brawley Reynolds, Marguerite P. Brawley, Individually and as Executrix of Estate of J. F. Brawley, and Reba B. Ward.

W. C. Coughenour, Jr., Guardian ad Litem for minor defendants.

DENNY, J. In construing a will, the instrument should be considered from its four corners, and effect given if possible, to every clause, or

phrase and word therein. *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Lee v. Lee,* 216 N.C. 349, 4 S.E. 2d 880; *Bell v. Thurston,* 214 N.C. 231, 199 S.E. 93; *West v. Murphy,* 197 N.C. 488, 149 S.E. 731; *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451; *Snow v. Boylston,* 185 N.C. 321, 117 S.E. 14; *McCallum v. McCallum,* 167 N.C. 311, 83 S.E. 350.

The primary object in interpreting a will is to ascertain what disposition the testator intended to make of his estate. *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892. "It is the accepted position in the construction of wills that unless in violation of some law the intent of the testator as expressed in the will shall be given effect and in ascertaining this intent the will shall be considered as a whole, giving to each and every part significance and harmonizing apparent inconsistencies where this can be done by a reasonable interpretation." *Snow v. Boylston, supra,* and cited cases.

It is quite clear that the testator did not intend for these appellants to share generally as next of kin *per stirpes,* in his estate. He expressed that intent very clearly in Items III and V of his will. Consequently, he gave to each of them $2,000.00, in lieu of a full share, and stated his reason for doing so. He further expressed the intent in Item V of his will, that the residue of his estate, which except for a few personal items, constituted all his estate, other than the legacies to these nephews in Item III and the trust estate set up in Item IV, should go to the beneficiaries named therein or the survivors thereof, *per stirpes,* to the exclusion of these nephews. However, it will be noted that the exclusion of the nephews in Item V was limited expressly to "this clause" and not to the will generally.

We think a careful consideration of the language contained in Items III and V of the will reveals an intent on the part of the grantor to make what he deemed to be an equitable distribution of his estate as between the children of his deceased brother, R. Vance Brawley, and the residuary legatees, because of the superior financial status of these particular nephews. But he does not use any language in making the final disposition of the residue that might be left in the trust estate, upon the death of the beneficiary of the trust, that would indicate an intention to exclude the appellants from participating in the distribution thereof. He expressly directs his trustee, upon the death of his brother, W. B. Brawley, to "distribute the residue of this trust estate remaining to and among my next of kin, *per stirpes.*"

The primary purpose for creating the trust estate and including in the *corpus* thereof the share devised to W. B. Brawley under Item V of the will, was to provide for the "maintenance, support and reasonable comfort" of this brother. The trustee, if it had been necessary to do so, might have expended the entire *corpus* of the trust estate on him. There-

fore, the testator may not have considered the disposition of the residue of the trust estate of primary importance. On the other hand, he may have considered that the adjustment already made in the distribution of the major portion of his estate, met his conception of an equitable distribution thereof, and that he intended for these appellants to share as next of kin *per stirpes,* in the residue, if upon the death of his brother, there should be anything left in the trust estate. The language he used is sufficient to include them and will be so construed, unless a contrary intent on the part of the grantor can be gathered from the will as a whole. *Wheeler v. Wilder,* 229 N.C. 379, 49 S.E. 2d 737; *Robinson v. Robinson,* 227 N.C. 155, 41 S.E. 2d 282; *Trust Co. v. Board of National Missions,* 226 N.C. 546, 39 S.E. 2d 621; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888; *Williams v. Rand, supra; Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

The defendant appellees argue that since the testator expressly excluded the appellants from sharing in the residue of his estate, as set forth in Item V of the will, they should not participate in the distribution of the residue of the trust estate, since the share of W. B. Brawley, bequeathed and devised to him in said Item, constitutes a part of the trust estate. We do not concur in this view. The testator in creating the trust estate for the benefit of his brother, W. B. Brawley, stated therein that the trust estate should "include such additions as may fall to the share of my said brother, W. B. Brawley, under other provisions of this will hereinafter stipulated." And in the residuary clause in Item V of the will, it is expressly provided that the share falling to his brother, W. B. Brawley, under that Item of the will, was not to be paid over to him but was to be added to and become a part of the trust estate created in Item IV of the will. It seems clear, therefore, that the testator never intended for any residue of the share falling to his brother, W. B. Brawley, to be distributed to the next of kin as defined and limited in Item V of the will, but rather that any such residue should be distributed to his next of kin *per stirpes,* as provided in Item IV of the will.

The cases relied upon by the defendant appellees are distinguishable from the instant case.

In *Hoyle v. Stowe,* 13 N.C. 323, the testator stated that his daughter, Elizabeth, had received a certain bequest from her grandfather, and it was his will that with such bequest and the property he expressly bequeathed to her therein, that "she be content, without claiming or receiving any further dividend out of my estate . . ." After making other bequests and providing for the education of his children, the will contained a residuary clause with respect to certain funds, and directed that such funds should be "equally divided amongst my children, paying due respect to the foregoing reservations." The court very properly held that

Elizabeth could not participate in the distribution of these funds or in any other residuary assets of the estate.

In the case of *Harper v. Harper,* 148 N.C. 453, 62 S.E. 553, the testator left a holograph will in which he provided as follows: "In case of my death the enclosed insurance is for my three daughters, Edith, Fay and Mildred. Henry D. Harper, Jr., has had his full share out of mine and his mother's estate." He then requested the Citizens Bank of Kinston "to be trustee of my children." The Court held that Henry D. Harper, Jr., was not entitled to any benefits under the trust set up for the children, nor was he entitled to any part of the estate.

The testator in the instrument under consideration, however, did not expressly limit the appellants to the bequest of $2,000.00 each. He limited their legacies only in so far as his estate was bequeathed and devised under Items III and V of the will. There is no limitation or expression affecting the distribution of the trust estate, which in our opinion, indicates an intent on the part of the testator to exclude the appellants from participating in the distribution thereof. Hence, we hold the children of R. Vance Brawley, to wit, Robert V. Brawley, Boyden Brawley and James S. Brawley, the appellants herein, are included in the class entitled to share in the residue of the trust estate, as next of kin *per stirpes,* as provided in Item IV of the last will and testament of M. H. Brawley, deceased.

The judgment of the court below will be modified in accord with this opinion.

Modified and affirmed.

JAMES M. CALDWELL v. R. L. ABERNETHY, ADMINISTRATOR OF THE ESTATE OF S. S. CARPENTER, DECEASED.

(Filed 12 April, 1950.)

1. Courts § 15—

An action to recover for loss of services of a minor child, killed in an accident occurring in another state, must be determined by the laws of such other state.

2. Evidence § 3—

Our courts will take judicial notice of the public laws of a sister state. G.S. 8-4.

3. Death § 5—

Under the laws of the State of Colorado, the surviving parent may maintain an action for loss of services of his minor child killed as a result of

alleged negligence, and recover as compensatory damages, not exceeding $5,000, the amount which will fairly and reasonably compensate the parent for financial loss sustained by reason of the child's death, excluding recovery for mental anguish.

APPEAL by plaintiff from *Rudisill, J.*, at Chambers in Newton, N. C., 6 October, 1949. From CATAWBA.

This is an action to recover for mental suffering and for loss of services, comfort, and society of plaintiff's unemancipated minor child as a result of her alleged wrongful death, which occurred in the State of Colorado.

It is alleged in the complaint that during the month of August, 1948, the defendant's intestate, S. S. Carpenter, of Lincoln County, N. C., in company with several members of his family, including his granddaughter, Sonia Elspeth Caldwell, nine years of age, the minor child of this plaintiff, made a trip by automobile to Morgan County, State of Colorado; that on the return trip to Lincolnton, N. C., the aforesaid S. S. Carpenter, while driving his automobile in a reckless and negligent manner in the County of Douglas, State of Colorado, on 20 August, 1948, ran said automobile into another vehicle on the highway, killing Sonia Elspeth Caldwell, the aforesaid minor, and her mother, Sonia Elspeth Caldwell, former wife of plaintiff, and himself.

The defendant demurred *ore tenus* on the ground that the complaint did not state a cause of action, demurrer was sustained and judgment entered accordingly.

The plaintiff appeals from the judgment entered below, and assigns error.

Fred D. Caldwell and Childs & Childs for plaintiff.

Smathers, Smathers & Carpenter and H. A. and Harvey A. Jonas, Jr., for defendant.

DENNY, J. The minor child of the plaintiff having been killed in the State of Colorado, the plaintiff's right to recover for the loss of services of such child must be determined by the law of that jurisdiction. *Morse v. Walker,* 229 N.C. 778, 51 S.E. 2d 496; *Harper v. Harper* and *Wickham v. Harper,* 225 N.C. 260, 34 S.E. 2d 185; *Buckner v. Wheeldon,* 225 N.C. 62, 33 S.E. 2d 480; *Baird v. Baird,* 223 N.C. 730, 28 S.E. 2d 225; *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911; *Frederick v. Ins. Co.,* 221 N.C. 409, 20 S.E. 2d 372; *Farfour v. Fahad,* 214 N.C. 281, 199 S.E. 521; *Rodwell v. Coach Co.,* 205 N.C. 292, 171 S.E. 82; *Howard v. Howard,* 200 N.C. 574, 158 S.E. 101.

The right to recover damages for loss of services growing out of an injury resulting in death is not recoverable at common law from the time

of death. Accordingly, there is no remedy available at common law for the recovery of loss of services in cases of instantaneous death. 16 Am. Jur., Sec. 45, p. 36; 25 C.J.S., Sec. 13, p. 1075; *Killian v. R. R.,* 128 N.C. 261, 38 S.E. 873; *Gurley v. Power Co.,* 172 N.C. 690, 90 S.E. 943; *Croom v. Murphy,* 179 N.C. 393, 102 S.E. 706; *Craig v. Lumber Co.,* 189 N.C. 137, 126 S.E. 312; *White v. Comrs. of Johnston,* 217 N.C. 329, 7 S.E. 2d 825.

In *Gurley v. Power Co., supra,* this Court said: "An action for the recovery of wages of a minor or for injury to him lies in favor of the parents; but if the child dies from the injury the action abates. The only action that lies in such case, in this State, is for wrongful death, as authorized by Revisal 59 (now G.S. 28-173), and that embraces everything. In such action the value of the life before 21 as well as after 21 years of age is recoverable. No other action lies than this."

In the instant case, however, if the plaintiff would be permitted to maintain this action under the *lex loci,* comity permits it to be maintained in this jurisdiction. *Rodwell v. Coach Co., supra; Howard v. Howard, supra.*

The wrongful death statute in the State of Colorado, applicable to the facts in this case, and of which we are bound to take judicial notice, G.S. 8-4, *Suskin v. Hodges,* 216 N.C. 333, 4 S.E. 2d 891; *Lewis v. Furr,* 228 N.C. 89, 44 S.E. 2d 604, provides: "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured." Chapter 50, sec. 2 of the 1935 Colorado Statutes Annotated; C.L. sec. 6303. And sec. 3 of the same chapter, C. L. sec. 6304, reads as follows: "All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 1 of this chapter, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand ($5,000) dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default." The parties who may bring an action for wrongful death, as provided in section 1 of this chapter, C. L. sec. 6302, referred to above, are:

"First—By the husband or wife of deceased, or

"Second—If there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased, or

"Third—If such deceased be a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. . . . If the action under this section shall be brought by the husband or wife of deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of said deceased under the statutes of descents and distributions, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descents and distributions."

The right to bring an action to recover for loss of services of a minor or for injuries to such minor, exists in Colorado in favor of the parents. However, separate suits may be brought for damages growing out of wrongful death and damages sustained for loss of services between the date of the injury and the date of the death of the injured party. *American Ins. Co. v. Naylor,* 103 Colo. 461, 70 P. 2d 353.

If the plaintiff has stated a cause of action, it is for damages growing out of the wrongful death of his minor child and not for loss of services sustained after injury and before death. We construe the pleadings to allege that Sonia Elspeth Caldwell died instantaneously.

It will be observed that the wrongful death statute of Colorado vests the right to bring an action for wrongful death in the parents or the surviving parent, and not in the personal representative. The words "father or mother" appearing in the statute, have been interpreted to mean "father and mother." *Pierce v. Conners,* 20 Colo. 178, 37 P. 721.

In the State of Colorado, children are liable for the support of their indigent parents. 1935 Colorado Statutes Annotated, Chapter 124, sections 2 and 3. Therefore, in an action for damages growing out of wrongful death, the damages recoverable "are not limited to such sum alone as the parent would probably have received from a child during the residue of the child's minority, but the parent is entitled to recover such sum as will fairly and reasonably compensate the parent for any financial loss sustained by reason of the child's death. . . ." *Longmont v. Swearingen,* 81 Colo. 246, 254 P. 1000. See also *Butler v. Townsend,* 50 Idaho 542, 298 P. 375.

The amount of the recovery in no case, under this section of the Colorado law, shall exceed $5,000. *Dillon v. Sterling Rendering Works,* 106 Colo. 407, 106 P. 2d 358; *Moffatt v. Tenney,* 17 Colo. 189, 30 P. 348.

The law under consideration allows compensatory damages only. The measure of damages recoverable under this section is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased had her life not been terminated by the alleged wrongful act of the defendant's intestate. *Moffatt v. Tenney, supra; Pierce v. Conners, supra; Gibson Consol. Min. & M. Co. v. Sharp,* 5

Colo. App. 324, 39 P. 850; *Mitchell v. Colo. Milling etc. Co.*, 12 Colo. App. 277, 55 P. 736.

There can be no recovery for mental anguish under the statute. "The recovery allowable is in no sense a *solatium* for the grief of the living occasioned by the death of the relative or friend, however dear." *Pierce v. Conners, supra.* Not only the kinship or legal relation between the deceased and the plaintiff may be considered in arriving at the true measure of compensatory relief, "but the actual relations between them, as manifested by acts of pecuniary assistance rendered by the deceased to the plaintiff, and also contrary acts, may be taken into consideration." *Pierce v. Conners, supra.*

When the plaintiff's complaint is considered in light of the provisions of the wrongful death statute of Colorado, and the decisions with respect thereto, we think the plaintiff has stated a cause of action.

The judgment of the court below is

Reversed.

STATE v. MILTON RICH.

(Filed 12 April, 1950.)

1. Criminal Law § 34e—

Testimony to the effect that defendant's wife, who was mortally injured, stated to the witness in the presence of defendant so that he must have heard it, that defendant "did it," is competent when the evidence discloses that the circumstances were such as to call for a denial by defendant if the declaration were not true.

2. Criminal Law § 81c (3)—

The admission of testimony over objection cannot be held harmful when substantially identical testimony is admitted without objection.

3. Homicide § 18—

When at the time of making the declaration the declarant is in actual danger of impending death, has full apprehension of such danger, and death ensues, testimony of the declaration is competent.

4. Same—

The competency of a dying declaration is a question of law for the trial court, and its ruling thereon will be reviewed only to determine whether there was evidence tending to show the facts necessary to support its decision.

5. Same—

Testimony tending to show that a doctor, after examining the victim, informed her she was approaching impending death, and that thereupon

she told him that she had been beaten by her husband and kicked in the abdomen, and that death ensued from such injury, *is held* sufficient to sustain the trial court's ruling admitting the dying declaration in evidence even though declarant herself made no statement that she believed she was about to die.

6. Homicide § 27h—

Where the evidence tends to show that defendant, while drunk, beat his wife, inflicting injuries causing her death, the refusal of the trial court to submit the question of defendant's guilt of the lesser offense of involuntary manslaughter is not error.

7. Criminal Law § 53f—

The explanation by the court in its charge to the jury of the reasons why the court admitted in evidence testimony of dying declarations, even though the competency of such testimony was not for the jury, will not be held for reversible error, especially when the court further charges that the weight of the declarations is a matter for the jury to consider and that the jury should not give them any peculiar weight because they were dying declarations, but only such weight as the jury should find them entitled to receive.

APPEAL by defendant from *Williams, J.*, at October Term, 1949, of SAMPSON.

Criminal prosecution upon bill of indictment charging defendant with the murder of one Irene Rich.

Defendant upon arraignment pleaded not guilty. Thereupon the Solicitor announced that the State would not ask for a verdict of murder in the first degree, but only for a verdict of murder in the second degree, or manslaughter, as the law and evidence might warrant.

Upon the trial in Superior Court, the State offered evidence tending to show that Irene Rich, the wife of defendant, was taken from her home to a hospital in Fayetteville, N. C., in the early evening of Sunday, 23 May, 1948, arriving there about 8:30 o'clock; that she was suffering from injuries evidenced by bruises on various parts of her body, particularly her stomach; that she died early the next morning as result of internal hemorrhage caused by the laceration of her liver and mesentery, which in turn was caused by a blunt instrument,—a blow to the abdomen, of recent occurrence, within a period of hours; and that defendant had inflicted such injury.

Defendant offered no evidence.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for a term of not less than 25 nor more than 30 years.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State.

Jeff D. Johnson, Jr., and Broughton, Teague & Johnson for defendant, appellant.

WINBORNE, J. Defendant in his brief filed in this Court presents for consideration four questions which we treat in the order and as stated.

I. "Was there error in the admission of the hearsay statement of the witness Oscar Rich?"

This witness, as the evidence shows, was a deputy sheriff, who was called to the home of the defendant on the late afternoon of Sunday, 23 May, 1948, and was there when the defendant's wife, the deceased, was taken to the hospital, and also was with the sheriff when defendant was taken to jail.

In the course of his examination this witness was asked, "Did his wife say what caused the pain in her stomach?" (Objection. Overruled. Exception.) The witness replied, "No, sir, she just said he did it. I asked her what was the matter. I said 'Irene, what in the world is the matter?', and she said 'Shine did it.' " (Motion to strike denied. Exception.) The objection is predicated upon the grounds that there was no evidence that defendant heard the statement of his wife, or that he apprehended the significance of it.

After reading the evidence we are unable to agree that either position is tenable. The witness had testified, without objection, that he was called to defendant's house and found defendant's wife, the deceased, lying on a bed; that she was breathing fast, and on being asked by him how she felt, she said, "Bad"; that she had some scratches about her face and body; that defendant was there; that upon the witness saying to her, "Irene, what in the world is the matter?", she said, "Shine did it"; that "Shine" is the defendant; that on being further asked what did he do it with, she said, "With a screw driver"; that she was making complaint in the presence of her husband, and that she said, "I hurt bad, right in here" (pointing to stomach). Then, after the question was asked and answered to which the assignment relates, the witness testified, as had the sheriff, that defendant, on the way to jail, in reply to question by the sheriff as to "what he did do, or did he beat his wife," said, "Yes, he beat hell out of her"; and on being further asked "What for," the defendant said, "Well, that's the $64 question."

This same witness also stated on cross-examination that the defendant was "well under the influence"; that he was lying on the bed with his wife, smoking a cigarette, when he, the witness, had the conversation with her; that he would say the defendant did hear the conversation; and that when his wife was put in the ambulance, he went in, caught hold

of each side of the cot and bent over and kissed her good-bye, and straightened up, the best he could, and got out and went in the house.

Thus it would seem that when the wife of defendant made the statement that "Shine did it," the circumstances were such that he was in position to hear it, and called for a denial by him if it were not true. *S. v. Jackson,* 150 N.C. 831, 64 S.E. 376; *S. v. Wilson,* 205 N.C. 376, 171 S.E. 338; *S. v. Hawkins,* 214 N.C. 326, 199 S.E. 284; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863.

In *S. v. Wilson, supra,* it is said: "When a statement is made, either to a person or within his hearing, implicating him in the commission of a crime to which he makes no reply, the natural inference is that the implication is perhaps well founded, or he would have repelled it. *S. v. Suggs,* 89 N.C. 527. But the occasion must be such as to call for a reply. 'It is not sufficient that the statement was made in the presence of the defendant against whom it is sought to be used, even though he remained silent; but it is further necessary that the circumstances should have been such as to call for a denial on his part, and to afford him an opportunity to make it.' 16 C.J. 659.

"Silence alone, in the face or hearing of an accusation, is not what makes it evidence of probative value, but the occasion, colored by the conduct of the accused or some circumstance in connection with the charge, is what gives the statement evidentiary weight. *S. v. Burton,* 94 N.C. 947; *S. v. Bowman,* 80 N.C. 432.

"The general rule is that statements made to or in the presence and hearing of a person, accusing him of the commission of or complicity in a crime, are, when not denied, admissible in evidence against him as warranting an inference of the truth of such statements."

But if it be conceded that the question and answer covered by the assignment were incompetent, the substance was almost identical with what had been admitted without objection. Hence, any error there might have been was harmless. *S. v. King,* 226 N.C. 241, 37 S.E. 2d 684, and cases cited.

II. "Was there error on the part of the court in the admission of the alleged dying declarations?"

The record shows that the doctor who examined Irene Rich, wife of defendant, when she arrived at the hospital, testified, over objection of defendant, that he advised her that she was approaching impending death, and that after so advising her, she told him that she had been beaten by her husband; that she came back to live with him six days previously, and during that interval of time she had been beaten several times; that the scratches were inflicted upon her by her husband with a screwdriver; and that, as to the last beating she sustained, he had

beaten her that afternoon, knocked her down, and then kicked her in the abdomen.

In this connection, the rule for the admission of dying declarations is well settled. The declarant at the time he made the statement should have been in actual danger of impending death, and in full apprehension of such danger, and death should have ensued. *S. v. Bright,* 215 N.C. 537, 2 S.E. 2d 541, and cases cited. See also *S. v. Bagley,* 158 N.C. 608, 73 S.E. 995; *S. v. Laughter,* 159 N.C. 488, 74 S.E. 913; *S. v. Stewart,* 210 N.C. 362, 186 S.E. 488; *S. v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156; *S. v. Ensley,* 228 N.C. 271, 45 S.E. 2d 357.

In *S. v. Bagley, supra,* it is said: "Dying declarations are admissible in cases of homicide when they appear to have been made by the deceased in present anticipation of death. It is not always necessary that the deceased should declare himself that he believes he is about to pass away, but all the circumstances and surroundings in which he is placed should indicate that he is fully under the influence of the solemnity of such a belief." In the *Bagley case* the evidence showed that a doctor, who was present with the deceased when he expired, told him that he was in a critical condition and was likely to die, and that if there was any message he wanted to leave, he had better do so,—and it was then that the incriminating declaration was made.

The admissibility of evidence of dying declaration is addressed to the judge and not to the jury. And, on appeal, the ruling of the trial court will be reviewed only to determine whether there was evidence tending to show the facts necessary to the decision. *S. v. Stewart, supra; S. v. Jordan, supra.*

Applying these rules to the evidence before the trial judge, the testimony of the doctor, through whom the declarations of deceased were introduced in evidence, would seem to be sufficient to support the ruling of the court, as to the competency of the declaration. A contrary decision would have found support in the testimony of the doctor. But be that as it might have been, we find no error in the ruling of the trial judge.

III. "Did the court err in its charge to the jury in not submitting that there might be a finding of guilty of involuntary manslaughter?"

As to this contention, the court instructed the jury that one of three verdicts might be returned, guilty of murder in the second degree, guilty of manslaughter, or not guilty. In the light of the evidence offered by the State, it does not appear that the failure of the trial judge to charge on involuntary manslaughter was error.

IV. "Did the court err in its explanation of the significance of the alleged dying declaration in that it placed too much emphasis on the weight and credibility thereof?"

It is contended that the court "overcharged" the jury in that too much stress was laid upon the admissibility of dying declarations,—that the court gave particular and unusual emphasis as to the solemnity of the circumstances wherein a dying declaration is made, thereby giving to the jury an undue and exaggerated impression as to the probative force of such evidence.

In this connection, it is true that the question of the competency of a dying declaration is addressed to the trial judge, as we have stated hereinabove, and the reasons given by the court for admitting such declaration, as an exception to the hearsay rule, are not matters for the consideration of the jury.

Yet we are unable to say that it is reversible error for the judge to tell the jury what the underlying reasons are for admitting such declarations.

And in this case the court instructed the jury that when such declarations are admitted in evidence, the weight of them is a matter for the jury to consider; that the jury should "scrutinize them carefully and cautiously, and not give them any peculiar weight because they are dying declarations, but just determine what weight, if any, they are entitled to receive at your hands, considering them as you would any other competent evidence in the case."

Thus it would seem that this instruction would dispel any probable wrong impression made by giving the reasons for the admission in evidence of such declarations.

Hence, after careful consideration of all questions presented, we find in the judgment below

No error.

MARK M. WHITEMAN v. SEASHORE TRANSPORTATION COMPANY, INC., AND COASTAL CONSTRUCTION, INC.,

and

MARK M. WHITEMAN, ADMINISTRATOR OF THE ESTATE OF HELEN R. WHITEMAN, DECEASED, v. SEASHORE TRANSPORTATION COMPANY, INC., AND COASTAL CONSTRUCTION, INC.

(Filed 12 April, 1950.)

1. Torts § 5—

One tort-feasor may not complain of nonsuit allowed its codefendant for failure of plaintiff's evidence to establish negligence on the part of such codefendant, when the question of its right to contribution against its codefendant is preserved by the admission of its evidence in regard thereto and the submission of the issue to the jury.

2. Trial § 36—

Where the issues submitted are sufficient to embrace all essential questions in controversy and to afford each party opportunity to present its case to the jury, exception to the court's refusal to submit issues tendered cannot be sustained.

3. Appeal and Error § 39f—

When the charge is without prejudicial error when considered contextually, exceptions thereto will not be sustained.

4. Appeal and Error § 38—

The burden is on appellant not only to show error but also that the error complained of was material and prejudicial.

5. Automobiles § 7—

The State Highway and Public Works Commission has authority to promulgate special speed restrictions at particular places on the highway when appropriate signs are properly erected. G.S. 20-141 (b), G.S. 20-141 (5) (d).

6. Automobiles § 12a—

The 1947 amendment to G.S. 20-141 provides that speed in excess of the limits fixed shall be "unlawful" rather than merely "*prima facie* evidence" that such speed is not reasonable or prudent.

7. Negligence § 20—

Exception to the failure of the court to give specific instructions on the doctrine of insulating negligence will not be held for error when the rights of the parties upon the evidence in the case are fully presented and explained in the instructions upon the question of proximate cause.

8. Negligence § 7—

The doctrine of insulating negligence is merely an application of the definition of proximate cause.

APPEAL by defendant Transportation Company from *Grady, Emergency Judge,* November Term, 1949, of LENOIR. No error.

Separate actions by Mark M. Whiteman individually and as administrator of Helen R. Whiteman, deceased, against the named defendants were by consent consolidated for trial. These actions were instituted to recover damages for injuries to the person and property of the individual plaintiff and for the wrongful death of his intestate, resulting from a collision between an automobile driven by plaintiff and a passenger bus of defendant Transportation Company. It was alleged that these injuries were proximately caused by the concurring negligence of the Transportation Company and the Coastal Construction Company in the respects set out in the complaint.

The collision out of which this litigation arose occurred about 5 p.m. 29 November, 1948, four miles east of Kinston, North Carolina, on a

highway bridge on which defendant Construction Company was making repairs under contract with the State Highway and Public Works Commission. The bridge was 140 feet long, 20 feet in width, and its general direction east and west. For the purpose of making the repairs the defendant Construction Company had placed on the bridge a large mechanical crane 39 feet long, 12 feet high, and 8 feet wide. This was placed near the longitudinal center of the bridge and on its northern edge obstructing the northern traffic lane and leaving only one lane open for travel on the bridge for the length of the crane. Warning signs had been placed along the highway on both sides leading to the bridge, and limiting speed to 15 miles per hour. The day was clear. The plaintiff was traveling west, and in the automobile with him were his wife, the intestate, and a small child. Observing the road signs, plaintiff stopped at the entrance to the bridge and sounded his horn. A flagman employed by the Construction Company appeared and with a red flag signaled him to proceed. As plaintiff slowly turned into the south traffic lane to pass the crane he observed the bus of defendant Transportation Company approaching from the opposite direction, in the same lane, apparently with unslackened speed. Plaintiff testified he stopped and was attempting to back his automobile when it was struck head-on by the bus, with the injurious results complained of.

Plaintiff's allegation in each complaint was that the defendant Transportation Company was negligent in that it operated its bus in approaching and traversing the bridge at an unlawful speed in violation of the statutes and the restrictions imposed by the State Highway Commission for the bridge, and without keeping proper lookout; that it failed to slacken the speed of the bus when it knew the roadway was limited to one way traffic; and did so in disregard of the signal from the flagman of its codefendant. Plaintiff alleged the defendant Construction Company was also negligent in that it failed to warn plaintiff of the dangerous speed at which the bus was approaching, and that it failed to provide a flagman at each end of the bridge, and that the flagman on duty was incompetent.

The defendant Transportation Company in its answer denied negligence on its part in any of the respects alleged, pleaded the contributory negligence of the plaintiff, and that the collision resulted from the negligence of defendant Construction Company in failing to provide flagmen at each end of the bridge, and that the flagman on duty gave the bus driver as he approached the bridge the signal to proceed. The Transportation Company pleaded that any negligence on its part was insulated by the negligence of the defendant Construction Company, and that, in the event it be held liable to plaintiff, it recover over against its codefendant for contribution or indemnity.

Defendant Construction Company denied negligence on its part and alleged that the sole proximate cause of the injuries complained of was the negligence of its codefendant Transportation Company.

On the trial the plaintiff's evidence tended to support his allegations and to show the careful manner in which he approached the bridge from the east, and the high speed of the bus which continued unchecked in spite of the road signs and of the timely stop signal given by the flagman when the bus was 500 feet away. The defendant Transportation Company's motion for judgment of nonsuit was overruled.

At the close of plaintiff's evidence defendant Construction Company moved for judgment of nonsuit in so far as the plaintiff's action against it was concerned, and this motion was allowed, but in view of the pleadings it was held that defendant Transportation Company was entitled to go to the jury on the question of contribution on issue to be submitted.

Thereupon the Transportation Company offered its evidence tending to show it was the duty of defendant Construction Company to provide flagmen at each end of the bridge; that the flagman on duty was inexperienced and incompetent; that as the bus approached the bridge the flagman on duty near the crane gave the bus driver the signal to proceed, and did so in such a way as to indicate the bus should proceed more rapidly to clear the traffic lane, and that the bus driver relied on the signal of the Construction Company's employee. There was other evidence in support. There was evidence *contra.*

Issues of negligence, contributory negligence and damage as between the plaintiff and the defendant Transportation Company were submitted to the jury and answered in favor of the plaintiff. The court also submitted at the same time an additional issue as to the negligence of the defendant Construction Company as alleged in the further answer of the Transportation Company, and this was answered by the jury in favor of the Construction Company.

From judgment in accordance with the verdict the defendant Transportation Company appealed.

Jones, Reed & Griffin and John G. Dawson for plaintiff, appellee.

Whitaker & Jeffress for defendant Coastal Construction, Inc., appellee.

Douglass & McMillan and Allen, Allen & LaRoque for Seashore Transportation Company, appellant.

DEVIN, J. The appellant Seashore Transportation Company assigns error in the ruling of the court below in allowing the motion of the defendant Construction Company for nonsuit as to plaintiff's causes of action against the Construction Company. This motion was interposed and ruled upon at the close of plaintiff's evidence. As the evidence which

had been offered by the plaintiff had failed to show actionable negligence on the part of defendant Construction Company, we think the movent was entitled to the allowance of its motion, in so far as the plaintiff was concerned, and the plaintiff did not except or appeal. We perceive no error therein of which the appellant can complain. However, in view of the appellant's pleading the court properly held open the question of the Construction Company's negligence as it might affect appellant's claim for contribution. Subsequently, appellant introduced evidence tending to show negligence on the part of the Construction Company's flagman in that he gave an improper signal to the driver of the bus, but there was evidence *contra,* and appellant's contentions were submitted to the jury under an appropriate issue and answered against the appellant. *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 369; *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911. Since plaintiff's evidence was sufficient to support the finding of negligence on the part of the appellant, and the only relief sought by appellant against the Construction Company was for contribution or indemnity, as to which it had its day in court, the adverse determination of the fact leaves appellant no ground for complaint on that score.

The appellant assigns error in the ruling of the trial court in respect to the issues submitted and the court's failure to submit other issues tendered, but we think those submitted were sufficient to embrace all essential questions in controversy and to afford each party opportunity to present its case to the jury. *Potato Co. v. Jeanette,* 174 N.C. 236, 93 S.E. 795; *Lewis v. Hunter,* 212 N.C. 504, 193 S.E. 814.

The appellant brought forward in its assignments of error numerous exceptions noted to the judge's charge to the jury on the issues submitted. While there are some expressions used by the court which may be open to criticism, when we consider the entire charge contextually we find it free from prejudicial error. *Braddy v. Pfaff,* 210 N.C. 248, 186 S.E. 340. "The charge must be considered contextually and not disjointedly." *Milling Co. v. Highway Com.,* 190 N.C. 692 (697), 130 S.E. 724. The case seems to have been submitted to the jury fairly and in substantial accord with well settled principles of law. The burden was on the appellant not only to show error but also to show that the error complained of was material and prejudicial, and that the result was affected thereby. *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863.

The statutes relative to the speed of motor vehicles on the highway confer authority upon the State Highway & Public Works Commission to declare a speed limit applicable to a particular place in the highway, which shall become effective and obligatory when appropriate signs are erected, as appears to have been done in this case. G.S. 20-141 (b); G.S. 20-141 (5) (d). It may be noted that the statutes establishing

limits to the speed of motor vehicles on the highway were amended by Chapter 1067, Session Laws 1947, which declares that speed in excess of the limits so fixed shall be "unlawful," rather than merely "*prima facie* evidence" that such speed was not reasonable or prudent. In view of the statutes in force at the time of the collision, the exception to the charge in this connection is untenable. *Holland v. Strader,* 216 N.C. 436, 5 S.E. 2d 311; *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740.

The evidence here was not such as to call for the application as a matter of law of the doctrine of insulating negligence (*Gas Co. v. Montgomery Ward & Co., ante,* 270, 56 S.E. 2d 689; *Warner v. Lazarus,* 229 N.C. 27, 47 S.E. 2d 496; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808), or to require specific instructions to the jury on the question whether the negligence, if any, of the Transportation Company in respect to speed was insulated by the subsequent intervention of the active negligence of the Construction Company in giving an improper signal to the bus driver, as the conflicting views as to responsibility for the injury were submitted to the jury for determination, from the evidence, of the ultimate fact of proximate cause. As was said in *Gas Co. v. Montgomery Ward, supra,* "the doctrine of insulating negligence is after all an application of the definition of proximate cause." *Butner v. Spease, supra; Lee v. Upholstery Co.,* 227 N.C. 88, 40 S.E. 2d 688; *McIntyre v. Elevator Co.,* 230 N.C. 539, 53 S.E. 2d 528.

After an examination of the entire record, we reach the conclusion that the verdict and judgment should not be disturbed.

No error.

O. S. GREEN, BESSIE GREEN, FRANK HOPKINS, HAROLD HOPKINS, BLANCHE ROBERSON, ANNIE BELL TYRE, HENRY L. HOPKINS, BENJAMIN HOPKINS, BUCK E. ROGERSON, FRED ROGERSON, ELMER ROGERSON, SLADE ROGERSON, ANNIE ROGERS, MARY EMMA MARTIN, EASTER MIZELLE, COTTIE HODGES, MRS. MYRTEN W. CHERRY, JESSE R. WOOLARD, SAM F. WOOLARD, ADDIE RUSS, GLYNN T. WOOLARD, MAURICE H. WOOLARD, DOROTHY WOOLARD ELKS, THURSTON D. WOOLARD, LUCILLE WARE, NINA WHEELER, GERALDINE WOOLARD, GOETHE WOOLARD, JR., AND ROSA MAE ROGERSON, A NON COMPOS MENTIS, APPEARING BY HER NEXT FRIEND, EDGAR J. GURGANUS; VIRGINIA GREEN, KENNETH G. GREEN, ISAAC GREEN, MADORA GREEN PRICHARD, AND LILLIAN GREEN TOLSON, v. N. C. GREEN AND WIFE, SYLVIA GREEN; LUCY MOBLEY AND HUSBAND, C. R. MOBLEY; JOHN W. GREEN AND WIFE, CHARLIE GREEN; H. C. GREEN AND WIFE, MRS. H. C. GREEN; WOLGA BLAND AND WIFE, MRS. WOLGA BLAND; HECTOR BLAND AND WIFE, MRS. HECTOR BLAND; EVA RHODES GETTIER AND HUSBAND, PAUL GETTIER; OTTIE RHODES ANDERSON AND HUSBAND, J. T. ANDERSON; CHAS. P. WINTON, JAMES G. WINTON, MARGARET WINTON, MARION E. WINTON, WILLIE EDWARD WINTON, THE LAST TWO BEING MINORS, AND N. C. GREEN, EXECUTOR OF THE ESTATE OF THE LATE J. E. GREEN.

(Filed 12 April, 1950.)

1. Wills § 42½—

The principle of ademption of specific legacies obtains in this State as a rule of law, and applies where the subject of a specific legacy has been withdrawn, disposed of, or has ceased to exist in the lifetime of testator.

2. Same—

The will bequeathed specified mortgage notes to named beneficiaries. A number of years prior to his death testator foreclosed the mortgages and purchased the land at the sale. *Held:* The legacies of the mortgage notes adeemed, and the beneficiaries were not entitled to the land.

APPEAL by petitioners from *Hatch, Special Judge,* November Term, 1949, of PITT. Reversed.

Petitioners alleged that as heirs of James E. Green they were tenants in common with defendants in five undevised tracts of land of which James E. Green died seized. The lands are described in the petition, and are herein referred to as follows: 1st tract containing 50¼ acres, C. L. Tripp land; 2nd tract containing 75 acres, L. G. Mills land; 3rd tract containing 122 acres, other L. G. Mills land; 4th tract containing 39 acres, C. P. Little land; 5th tract containing 16½ acres, R. W. Dail land.

Defendant N. Cortez Green pleaded sole seizin as to tracts 1, 2 and 3, and the other answering defendants pleaded sole seizin as to tracts 4 and 5. Defendants claim under the following provisions of the will of James E. Green: "Second . . . Also I bequeath to said N. Cortez Green

the following mortgage notes held by me against the following persons, L. G. Mills, H. J. Jolly, T. E. Cannon, A. D. McLawhorn, M. G. Tucker and C. L. Tripp. Third. The balance of my mortgage notes I bequeath to Mrs. Charlie Green Mobley, of Williamston, N. C., Mrs. Ottie Green Rhodes, of Fernandina, Fla., Wolga Bland, of Portsmouth, Va., and Hector Bland, of Worchester, Mass., equally to share and share alike."

The will of James E. Green was executed 6 February, 1932, and he died 29 June, 1948. Between these dates all of the mortgage notes referred to in paragraph 2 of the will were paid, except the Tripp and Mills notes. In 1933 the mortgages securing these notes were foreclosed and title to the lands mortgaged, and herein referred to as the Tripp and Mills tracts, was acquired by James E. Green. Likewise, the mortgage notes referred to in paragraph 3 of the will were all paid during the life of James E. Green except the Little and Dail notes. These were foreclosed and title to the lands mortgaged and referred to as Little and Dail tracts was acquired by James E. Green as result of such foreclosure.

Defendants claim title to the lands which were acquired by the testator by foreclosure of the mortgages securing the notes which had been bequeathed to them.

Petitioners claim that, by reason of the foreclosures, the notes described in the will had legally ceased to exist long before the death of the testator, and that the legacies were adeemed, and that hence the lands were undevised real property descending under the canons of descent to all the heirs of James E. Green.

It was admitted that after the execution of his will James E. Green purchased another tract of 4 acres, and that this passed to his heirs as undevised real property. This sixth tract has no relation to the question here litigated.

Jury trial was waived, and the court, after finding the facts in detail, held that the bequests to the defendants were not adeemed by the subsequent sales under foreclosure and purchase by James E. Green, and adjudged that N. Cortez Green was owner of tracts 1, 2, and 3, and the other named defendants were owners of tracts 4 and 5 in the proportions set out in the answers, and that the 4-acre tract be sold for partition. Petitioners excepted and appealed.

Chas. H. Manning for plaintiffs, appellants.
R. L. Coburn for defendant N. Cortez Green, appellee.
Peel & Peel for other defendants, appellees.

DEVIN, J. The question presented for decision is whether the bequests to the defendants designated in the will as mortgage notes were adeemed by the subsequent foreclosure of the mortgages securing the notes and

purchase of the mortgaged lands by the testator, or whether the legatees are entitled under the will to the lands thus acquired by the testator.

The principle of ademption is firmly imbedded in the law of wills, and is recognized in this jurisdiction as applicable to specific legacies as a rule of law rather than of particular intent on the part of the testator. *Grogan v. Ashe,* 156 N.C. 286 (291), 72 S.E. 372; Page on Wills, sec. 1527. It applies to defeat a bequest where the subject of a specific legacy has been withdrawn, disposed of, or has ceased to exist during the lifetime of the testator. *Anthony v. Smith,* 45 N.C. 188; *Starbuck v. Starbuck,* 93 N.C. 183; *Tyer v. Meadows,* 215 N.C. 733, 3 S.E. 2d 264. In the language of *Justice Brown* in *Rue v. Connell,* 148 N.C. 302, 62 S.E. 306, "It denotes the act by which a specific legacy has become inoperative on account of the testator's having parted with the subject of it." Said *Chief Justice Pearson* in *Chambers v. Kerns,* 59 N.C. 280, "These are well settled principles of law, and if by their application the intention of the testator is disappointed, the Court can say it is not the fault of the law, but the neglect of the testator in not adding a codicil to set out his intention, made necessary by the alteration in the condition of his estate, caused by his act." In the language of *Justice Brogden* in *King v. Sellers,* 194 N.C. 533, 140 S.E. 91, "the test of ademption is such a change in the subject matter of the legacy as to destroy its identity."

While most of the cases on this subject which have been considered by this Court relate to the ademption of devises of land by subsequently executed conveyances by the testator, the same rules must be held equally to apply where notes receivable described in the will are paid, or rendered inoperative, or discharged by foreclosure of the security, and real property acquired by the testator indirectly as result of such foreclosure.

This is illustrated by the case of *Chambers v. Kerns,* 59 N.C. 280, where, subsequent to the execution of the will specifically devising land, the testator agreed to sell the land and executed bond for title in consideration of a note for the purchase money. After the death of the testator the note was paid, and the question arose whether the money should be paid to the devisee or the testator's executor. It was held the devise had been defeated, for the reason that at the time of his death the testator "had ceased to be the owner of the land which was the subject of the devise." We note a similar ruling in *Perry v. Perry,* 175 N.C. 141, 95 S.E. 98, where the testator directed his executor to sell his real property and distribute the proceeds to certain named legatees, but later in his lifetime testator sold the land. It was held by this Court that the legacies were adeemed, and the provision for the legatees defeated.

A somewhat different result was reached in *Noe v. Vannoy,* 59 N.C. 185, where the testator devised "the proceeds of the sale" of certain land which he had contracted to sell. Though the testator completed the sale

in his lifetime, it was held the legacy "in the proceeds" was not defeated. To the same effect was the holding in *Rue v. Connell,* 148 N.C. 302, 62 S.E. 306, where the devise was of "all and every right, title and interest in" certain land. At the time of the execution of the will the extent of testator's interest had been in litigation. Subsequent to his death by court decree his title to the land was lost but the successful litigant was required to pay a certain sum, which it was held should go to the devisee. Those cases and others of similar import illustrate the modification of the rule where the language of the devise is sufficiently comprehensive to prevent the application of the principle of ademption. In *Hill v. Colie,* 214 N.C. 408, 199 S.E. 381, a legacy of the household and tangible property in and about testator's residence and farm was defeated by the subsequent conveyance of the land by the testator.

The principle of the ademption of a legacy by subsequent conveyance or material alteration in the character of the subject of the legacy has been generally upheld in other jurisdictions, and applied to a change from mortgage notes to absolute ownership of the property mortgaged. In 65 A.L.R. 640 (note) the majority rule is stated as follows: "In a majority of cases it is held that a change from interest by way of security to an absolute ownership of property adeems a legacy." And in 57 A.J. 1093, it is stated "in a majority of the cases involving the point, the view is taken that a bequest of personal property or of notes and mortgages is adeemed to the extent of any mortgage with respect to which the testator has acquired the absolute ownership of the real estate mortgaged. In a few instances a different result has been necessitated by the language of the will involved or the peculiar facts and circumstances shown." See also 59 C.J. 1013.

The following cases may be cited as supporting the view that the disposition of the mortgage notes by foreclosure by the testator constitutes ademption. *In re Behre's Estate,* 130 Wash. 458; *Franck v. Franck,* 24 Ky. L. Rep. 1790, 72 S.W. 275; *Tolman v. Tolman,* 85 Me. 317; *In re Keller's Estate,* 225 Iowa 1349, 282 N.W. 362; *Willoughby v. Watson,* 114 Kan. 82; *Alexander v. House,* 133 Conn. 725; *Reynolds v. Reynolds,* 187 Ky. 324; *Lewis v. Thompson,* 142 Ohio St. 338; *Blaisdell v. Coe,* 83 N.H. 67; *Lenzen v. Miller,* 309 Ill. App. 617; *In re Hilpert's Estate,* 300 N.Y.S. 886; Page on Wills, secs. 1521.

In a California case, cited by defendants, *In re McLaughlin,* 275 Pac. 874, where the devise was "all my interest in that certain mortgage," it was held the devise was not adeemed by subsequent conveyance of the mortgaged land to the testatrix in satisfaction of the debt. A similar result was declared in *Van Wagenan v. Brown,* 26 N.J.L. 196, in view of the peculiar language of the will. *Van Wagenan v. Baldwin,* 7 N.J. Ed. 211. See also *Succession of Shaffer,* 50 La. Ann. 601, 23 So. 639

(other notes substituted for those bequeathed); *Bills v. Putnam,* 64 N.H. 554 (decided on phraseology of the will); *Eddington v. Turner,* 38 A. 2d 738, 155 A.L.R. 562.

It may be noted here the testator, after making bequest of mortgage notes in his will executed in 1932, proceeded in 1933 to foreclose the mortgages securing the unpaid notes and obtained title to the mortgaged lands as result of such foreclosure. Notwithstanding this substantial change in the character and form of the subjects of his bequest, he made no change in his will, though he lived some fifteen years thereafter. If it be thought the testator intended the legatees should have land in substitution for notes, the disappointment is due to his failure to effectuate his intention.

After careful consideration of the facts found by the court below, we reach the conclusion that the character of the bequests contained in the second and third paragraphs of the will had been, by the act of the testator, materially changed and their identity destroyed, so that at the time of his death these subjects of his bounty were no longer in existence. Hence the undevised lands of which James E. Green died seized descended to his heirs at law.

The judgment is vacated and the cause remanded for appropriate proceedings in accordance with this opinion.

Reversed.

ARTHUR E. PUETT, CLARENCE L. McCALL AND ROY H. MORRISON v. THE BAHNSON COMPANY AND MARYLAND CASUALTY COMPANY.

(Filed 12 April, 1950.)

Master and Servant § 40d—

Injuries sustained in an automobile accident by employees while on their way to or from their work in an automobile owned by one of them arises out of and in the course of their employment when, under the terms of the employment and as an incident to the contract of employment, allowances are made by the employer to cover the cost of such transportation.

BARNHILL and ERVIN, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Rudisill, J.,* September-October Term, 1949, of BURKE.

Proceeding under Workmen's Compensation Act to determine liability of defendants to three injured employees, Arthur E. Puett, Clarence L. McCall and Roy H. Morrison.

In addition to the jurisdictional determinations, the essential findings of the Industrial Commission follow:

The plaintiffs, who live in Morganton, were employed by the defendant to install an air-conditioning system in a cotton mill at Rhodhiss, a distance of some 15 or 20 miles from their homes. They commuted back and forth each day, first with one of the employees "furnishing transportation and then the other; that on the day in question (24 April, 1947) the claimants were riding with Clarence McCall and about 6:30 or 7:00 o'clock in the morning while they were on their way from Morganton to Rhodhiss and at a point about five or six miles north of Morganton, they were involved in an automobile accident, including their jeep and two other motor vehicles," which resulted in injury to all three claimants.

As it was not convenient for the claimants to procure living quarters in Rhodhiss, each was paid $20.80 a week in addition to his regular salary, to cover his living expenses and the expense of traveling to and from the place of employment.

"This Commission has uniformly held that injuries received while going to and from work are not generally compensable, but we have held with equal consistency that where transportation is furnished in going to and from work, that the injury sustained during said time is compensable, and we think that this is true whether the actual vehicle is furnished by the employer or whether the employer furnishes the money to pay for said transportation and leaves it to the employee to provide his own mode of transportation."

The Commission, therefore, awarded compensation to each of the claimants, and this was affirmed on appeal to the Superior Court. From this latter ruling, the defendants appeal, assigning errors.

O. Lee Horton for plaintiffs, appellees.

Proctor & Dameron for defendants, appellants.

STACY, C. J. The question for decision is whether an injury sustained in an automobile accident by employees while on their way to or from their work arises out of and in the course of the employment, when, under the terms of the employment, allowances are made by the employer to cover the cost of such transportation. No exact prototype of this question is to be found in any of our previous decisions. It seems to be one of first impression. *Rewis v. Ins. Co.*, 226 N.C. 325, 38 S.E. 2d 97.

The claimants cite *Smith v. Gastonia*, 216 N.C. 517, 5 S.E. 2d 540, as tending to support their position. The defendants say the case of *Hunt v. State*, 201 N.C. 707, 161 S.E. 203, is more nearly in point. In the *Smith Case* the employer furnished the means of transportation, the car itself, and the claimant was on duty at the time of the injury. In the

Hunt Case the claimant furnished his own means of transportation, albeit his pay started from the time he left home. Even so, the claimant had not reached the place where he could do any work for the employer when the injury occurred. See *Mion v. Marble & Tile Co.,* 217 N.C. 743, 9 S.E. 2d 501; *Hildebrand v. Furniture Co.,* 212 N.C. 100, 193 S.E. 294; *Dependents of Phifer v. Dairy,* 200 N.C. 65, 156 S.E. 147.

The authorities elsewhere are inharmonious, 58 Am. Jur. 726, with the majority favoring compensation. The Industrial Commission has consistently followed the majority view, and we are inclined to approve, where, as here, the cost of transporting the employees to and from their work is made an incident to the contract of employment. *Archie v. Lumber Co.,* 222 N.C. 477, 23 S.E. 2d 834; *Voehl v. Indemnity Ins. Co.,* 288 U.S. 162, 77 L. Ed. 676, 87 A.L.R. 245, and Annotation, 250. See, also, *Geltman v. Reliable Linen & Supply Co.,* 128 N.J.L. 443, 139 A.L.R. 1465.

Affirmed.

BARNHILL and ERVIN, JJ., took no part in the consideration or decision of this case.

PAUL HILL v. CHARLES M. BRITT.

(Filed 12 April, 1950.)

Appeal and Error § 40a—

A sole assignment of error to the signing of the judgment will not be sustained when the judgment is amply supported by the lower court's findings and conclusions of law.

APPEAL by plaintiff from *Bobbitt, J.,* at Chambers in Salisbury, N. C., 8 March, 1950. From RANDOLPH.

This is an action in which the plaintiff seeks a writ of *mandamus* to compel the appointment of three members of the Randolph County Board of Elections by the defendant, on the ground that R. A. Gaddis, Zell Brown and John G. Prevette, who were appointed to constitute the membership of said Board by the State Board of Elections in 1948, and who qualified as such, have vacated their respective offices by reason of the matters alleged in the complaint.

On the hearing below, it was made to appear that there was then pending in the Superior Court of Randolph County a suit in the nature of a proceeding in *quo warranto,* wherein the right of R. A. Gaddis, Zell

Brown and John G. Prevette to offices as members of the Randolph County Board of Elections was directly in issue.

Whereupon, the court held: (1) That this action in substance is to try the title of the above parties, and each of them, to membership on the Randolph County Board of Elections; (2) that membership on said Board is a public office as contemplated and defined by law and the sole remedy to try title to said office is by civil action in the nature of a proceedings in *quo warranto;* (3) that no action to try the title of R. A. Gaddis, Zell Brown and John G. Prevette, or any one of them, to membership on said Board, may be maintained when none of these persons is a party to the action; and (4) that under G.S. 163-13, the plaintiff has no clear legal right to compel the defendant, as Chairman, to fill the vacancy, if one exists, it being a matter of policy for the determination of the State Board of Elections, whether such vacancy be filled by the Board or by its Chairman; and that the members of the State Board of Elections, other than the defendant (Chairman) are not parties to the action.

Accordingly, the plaintiff's petition for writ of *mandamus* was denied and the action dismissed.

Plaintiff appeals and assigns error.

Ottway Burton for plaintiff.

Attorney-General McMullan and Assistant Attorney-General Bruton for defendant.

PER CURIAM. The only assignment of error is to the signing of the judgment. The judgment is amply supported by the court's findings of fact and conclusions of law, to which there is no exception. *Rader v. Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609.

The judgment of the court below is

Affirmed.

MRS. MAUDE FOSTER v. OTTWAY BURTON AND WIFE, RUBY B. BURTON.

(Filed 12 April, 1950.)

DEFENDANTS' appeal from *Bennett, Special Judge,* October Term, 1949, RANDOLPH Superior Court.

John G. Prevette and H. Wade Yates for plaintiff, appellee.

Ottway Burton for defendants, appellant.

PER CURIAM. The plaintiff brought this action against the defendants to recover for personal injuries alleged to have been sustained through the negligence of the *feme* defendant in the operation of a motor vehicle. The cause was tried by a jury, the issues were answered favorably to the plaintiff, and from the ensuing judgment defendants appealed.

Only one question is posed by the appeal: Whether the court committed error in overruling defendants' demurrer to the evidence and motion for judgment as of nonsuit. G.S. 1-183.

Examination of the record leads to the conclusion that the demurrer and motion were properly overruled.

We find

No error.

JESSE H. KNOTT, SR., ADMINISTRATOR OF THE ESTATE OF JESSE H. KNOTT, JR., DECEASED, v. KINSTON TRANSIT COMPANY.

(Filed 12 April, 1950.)

APPEAL by plaintiff from *Parker, J.*, at 27 February Term, 1950, of LENOIR.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate, a small boy nine years of age, when he collided with a bus of defendant, operated on a public street in the city of Kinston, N. C.

Judgment as of nonsuit was entered on the trial below at the close of plaintiff's evidence, and plaintiff appeals to Supreme Court and assigns error.

Jones, Reed & Griffin for plaintiff, appellant.

John G. Dawson and Whitaker & Jeffress for defendant, appellee.

PER CURIAM. A careful reading of the evidence offered by plaintiff on the trial below and shown in the record of this appeal, taken in the light most favorable to plaintiff, fails to show that defendant did anything that it should not have done, or left undone anything that it should have done at the time and under the circumstances under which the plaintiff's intestate came to his untimely death. Rather, the evidence reveals, in so far as the operation of defendant's bus is concerned, an unavoidable accident,—deplorable as it is,—for which defendant may not be held liable in damages. Hence the judgment as of nonsuit will be, and it is hereby

Affirmed.

STATE v. HAL WAY.

(Filed 12 April, 1950.)

APPEAL by defendant from *Armstrong, J.*, December Term, 1949, of RANDOLPH. No error.

The defendant was indicted for assault with deadly weapon with intent to kill, inflicting serious injury not resulting in death. G.S. 14-32. The jury returned verdict of guilty of assault with deadly weapon, and from judgment imposed defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Walter F. Brinkley, Member of Staff, for the State, appellee.

Sam W. Miller for defendant, appellant.

PER CURIAM. Defendant's only assignments of error relate to the action of the trial court in overruling his objection to certain questions propounded to defendant on cross-examination, but from inspection of the record the impropriety of the questions does not appear, nor do we perceive harm resulting therefrom to defendant's cause. The evidence was sufficient to support the verdict, and there was no exception to the judge's charge to the jury. *S. v. Sullivan,* 229 N.C. 251 (258), 49 S.E. 2d 458.

No error.

BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION v. GRANNIS BROTHERS, INC., AND GRANNIS BROTHERS, FIRM COMPOSED OF C. K. GRANNIS, K. SLOAN AND MARY G. McCLOUD.

(Filed 19 April, 1950.)

1. Process § 14—

Process may be amended to correct a mere misnomer, in which instance it is not considered a substitution of new parties, but a correction of the description of the party actually served.

2. Same—

As a general rule, where a partnership has been designated in the process as a corporation, and a member of the firm has been served with summons, the members of the partnership may be substituted by amending the process and allowing the pleadings to be amended, but this rule is not applicable when the corporation as designated is not the firm name of the partnership.

3. Process § 5a—

Service on an individual as an officer of a nonexistent corporation is not service on the individual as a partner of a firm trading under a name materially different from the designated corporate name, there being no motion to amend the process.

4. Appearance § 2b—

A general appearance made on behalf of a purported corporation is not a general appearance on behalf of a partnership with a materially different firm name, none of whose members was a party to the action and against whom no cause of action is stated.

5. Limitation of Actions § 11—

The institution of an action against a purported corporation will not stop the running of the statute of limitations in favor of a partnership until the process is amended or the members of the partnership are otherwise brought in and made parties.

APPEAL by C. K. Grannis, K. Sloan and Mary G. McCloud, trading as E. W. Grannis Company, from *Bennett, Special Judge,* at October Term, 1949, of CALDWELL.

The plaintiff caused a summons to be issued on 11 December, 1948, naming Grannis Bros., Inc., as the defendant therein. This summons was not served within the required time and an *alias* summons was issued on 11 January, 1949. The original summons and the *alias* directed the sheriff or other lawful officer of Cumberland County to summons "C. K. Grannis and K. Sloan Grannis, officers of defendant corporation." Both the original and *alias* summons, together with a copy of the complaint, were served on C. K. Grannis 17 January, 1949. There is no such person as K. Sloan Grannis.

The complaint set forth a cause of action for damages against the purported defendant corporation.

At the January Term, 1949, of the Superior Court of Caldwell County, the following order was entered:

"This cause coming on to be heard before the undersigned, George B. Patton, Judge Presiding, upon motion of the defendant in the above entitled case for an extension of time to file Answer or other pleadings, without prejudice, in the above case; it appearing to the Court that this action was filed December 11, 1948, and that no summons has been returned in said action and it is therefore unknown whether service has been had upon the defendant corporation; it further appearing that no *alias* summons has been returned in said case;

"It Is, Therefore, Considered and Ordered by the Court that the defendant is allowed 30 days from the adjournment of this Court or 30 days from service of summons and Complaint in said action as by law

provided whichever period of time is the longest. It being the effect of this Order to give the defendant not less than 30 days from the adjournment of this Court in any event to file Answer or other pleadings as it may be advised.

"GEORGE B. PATTON, Judge Presiding."

Thereafter, on 19 February, 1949, C. K. Grannis, K. Sloan and Mary S. McCloud, trading as E. W. Grannis Company, through their counsel, entered a special appearance in this cause and moved to dismiss the action on the following grounds:

"1. The title of said cause of action runs as follows: Blue Ridge Electric Membership Corporation *v.* Grannis Brothers, Inc., the summons in said cause of action runs as follows: C. K. Grannis and K. Sloan Grannis, officers of defendant corporation.

"2. There is no such entity as Grannis Brothers, Inc., there being no such corporation in the State of North Carolina.

"3. E. W. Grannis Company is a partnership composed of C. K. Grannis, K. Sloan and Mary G. McCloud.

"4. The summons as served on C. K. Grannis, as an officer of Grannis Brothers, Inc., does not bring the partnership as above named into Court, and therefore the Court has no jurisdiction over the said partnership."

The court below held C. K. Grannis has been duly served and that the use of the words "officers of defendant corporation" in the summons, amounted in law to surplusage, and that the general appearance entered on behalf of the purported corporation made the defendants amenable to the judgment of the court.

Whereupon the court denied the motion to dismiss the action, and allowed the plaintiff 30 days to file a complaint "making C. K. Grannis, K. Sloan and Mary G. McCloud, partners, 'trading and doing business as E. W. Grannis Co.' parties defendant individually without service of summons upon the said K. Sloan and Mary S. McCloud," and allowed the defendants 30 days from the filing of the amended complaint to answer.

The individuals composing the partnership of E. W. Grannis Co. appeal, assigning error.

Max C. Wilson and Hal B. Adams for plaintiff.

Folger L. Townsend and Fate J. Beal for defendants.

DENNY, J. It is conceded that there is no such corporation in existence as Grannis Bros., Inc. Therefore, the real question posed is whether service on C. K. Grannis, described in the summons as an officer of the

nonexistent corporation, is service on him as a member of the partnership of E. W. Grannis Co.

We have carefully considered the case of *Plemmons v. Improvement Company,* 108 N.C. 614, 13 S.E. 188, where the action was instituted against the Southern Improvement Company and the officer was directed to serve, and did serve, the summons on "A. H. Bronson, President of the Southern Improvement Company." There, as here, no cause of action was stated against the individual served with summons. The Court held it was legally a summons and service upon A. H. Bronson individually; that the words "President of the Southern Improvement Company" were mere surplusage. The Court further held that such service was not service on the defendant corporation, and sustained an order in which the lower court declined to make the corporation a party by amendment, but said the corporation must come in voluntarily or be served with process. However, there is nothing in the opinion to indicate that mere service of summons on A. H. Bronson entitled the plaintiff to any relief against him.

As a general rule courts are more reluctant to permit an amendment to process or pleadings to change the description of a party from an individual or partnership to a corporation, than they are to change the description of a party as a corporation to an individual or partnership. The reason for this is due to the prescribed statutory method of serving process on corporations. *Plemmons v. Southern Improvement Co., supra; Hatch v. R. R.,* 183 N.C. 617, 112 S.E. 529; *Jones v. Vanstory,* 200 N.C. 582, 157 S.E. 867; *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789.

Under the comprehensive power to amend process and pleadings, where the proper party is before the court, although under a wrong name, an amendment will be allowed to cure the misnomer. *Lane v. Seaboard and Roanoke R. R. Co.,* 50 N.C. 25; *Fountain v. Pitt County,* 171 N.C. 113, 87 S.E. 990; *Chancey v. Norfolk & W. R. R. Co.,* 171 N.C. 756, 88 S.E. 346; *Drainage District v. Cabarrus County,* 174 N.C. 738, 94 S.E. 530; *Gordon v. Gas Co.,* 178 N.C. 435, 100 S.E. 878; *Chowan County v. Commr. of Banks,* 202 N.C. 672, 163 S.E. 808; *Clevenger v. Grover,* 212 N.C. 13, 193 S.E. 12, 124 A.L.R. 82; *Lee v. Hoff,* 221 N.C. 233, 19 S.E. 2d 858; *Propst v. Trucking Co.,* 223 N.C. 490, 27 S.E. 2d 152; 39 Am. Jur., Parties, Sec. 125.

It seems to be the general rule that where individuals are doing business as partners under a firm name and such firm is described or designated in an action, as a corporation, and the process is served on a member of the partnership, the members of the partnership may be substituted by amending the process and allowing the pleadings to be amended. *Key v. Goodall B. & Co.,* 7 Ala. App. 227, 60 So. 986; *Craig v. San Fernando*

Furniture Co., 89 Cal. App. 167, 264 P. 784; *World F. & M. Ins. Co. v. Alliance Sandblasting Co.,* 105 Conn. 640, 136 A. 681; *C. H. Perkins Co. v. Shewmake & Murphy,* 119 Ga. 617, 46 S.E. 832; *Farmers' & M. Bank v. Bank of Glen Elder,* 46 Kan. 376, 26 P. 680; *Strange v. Price,* 191 Ky. 734, 231 S.W. 532; *DeWitt v. Abraham Bros. Horse & Mule Co.,* 170 App. Div. 610, 156 N.Y.S. 658; *Goldstein v. Peter Fox Sons Co.,* 22 N.D. 636, 135 N.W. 180, 40 L.R.A. (N.S.) 566; *McGinnis v. Valvaline Oil Works,* 251 Pa. 407, 96 A. 1038. For additional authorities, see 121 A.L.R. Anno. 1335, *et seq.*

We do not think, however, the plaintiff in this case is in position to invoke the general rule, since the appellants were not sued as a corporation under their firm name. The nonexistent corporation was described as "Grannis Bros., Inc.," while these appellants at all times referred to in the complaint, have traded under the firm name of "E. W. Grannis Co."

Consequently, in our opinion, the plaintiff is not entitled to have the partnership substituted as the defendant in lieu of the corporation under the theory or doctrine of misnomer. Substitution in the case of a misnomer, is not considered substitution of new parties, but a correction in the description of the party or parties actually served. However, according to the record, the plaintiff has never moved to amend the process so as to make these appellants parties to the action by substitution or otherwise.

It will be noted that when the appellants entered a special appearance and moved to dismiss the action for lack of service on them, the court denied the motion and held that by reason of the general appearance made as hereinbefore set out, the defendants are in court and amenable to its judgment.

We do not think the general appearance made on behalf of the purported corporation can be construed as a general appearance on behalf of a partnership, none of whose members was a party to the action, and against whom no cause of action was or has been stated.

Moreover, the court did not amend the process and direct that the appellants be substituted as defendants in lieu of the nonexistent corporation, or that C. K. Grannis be made a party defendant. The court merely ordered that the plaintiff be allowed 30 days from the rising of the court to amend its pleadings, making the appellants parties defendant, without additional service of summons upon K. Sloan and Mary S. McCloud.

It is apparent from the record and briefs filed herein that unless the plaintiff can hold these appellants as parties by reason of the service of the *alias* summons on C. K. Grannis, or by reason of the general appearance made by some undisclosed party in behalf of the purported but non-

existent corporation named as defendant, the plaintiff's claim was barred by the three year statute of limitations more three months prior to the hearing below.

It is said in 54 C.J.S., Limitations of Actions, 317: "For limitation purposes, an amendment substituting a new defendant is regarded as the commencement of a new action or proceeding against such defendant, and does not relate back to the commencement of the original action, where a new cause of action is set up by the amendment, or the original defendant was dead or otherwise nonexistent at the time of the attempted commencement of the action and therefore no action was commenced against anyone prior to the amendment, or the suit has abated as to the original sole defendant, or the case is one of a mistake as to the identity, rather than a misnomer, of the person liable."

It is conceded that the designated defendant at the time the action was instituted, and the pleadings were filed, was and still is nonexistent. In such an instance the statute of limitations will not cease to run until the process is amended or proper parties are brought in and made defendants. No attempt on the part of the plaintiff, in so far as the record discloses, has been made to amend the original process or to make the appellants parties defendant, although the correct firm name and the names of the members thereof, were disclosed to the court on 19 February, 1949. Apparently the plaintiff has relied altogether on the general appearance set forth herein and the service of the *alias* summons on C. K. Grannis, to sustain the cause of action against these appellants. The appellants entered a special appearance on 19 February, 1949, and moved to dismiss the action for want of jurisdiction. The motion was not heard until 11 October, 1949. In the meantime no motion was lodged by the plaintiffs to amend the process, or the pleadings, or to make C. K. Grannis, who had been served with summons, a party to the action. Hence, we think, upon the facts disclosed by the record, the motion to dismiss should have been granted. *Town of Wendell v. Scarboro,* 213 N.C. 540, 196 S.E. 818; *Stricklin v. Davis,* 196 N.C. 161, 144 S.E. 698; *Mellon v. Arkansas Land & Lumber Co.,* 275 U.S. 460, 72 L. Ed. 372; McIntosh's N. C. Practice & Procedure, Sec. 436; *New York State Monitor Milk Pan Asso. v. Romington Agri. Works,* 89 N.Y. 22, 25 Hun. 475; *Girardi v. Laquin Lumber Co.,* 232 Pa. 1, 81 A. 63; *Sawyer v. New York State Clothing Co.,* 58 Vt. 588, 2 A. 483; 121 A.L.R. Anno. 1333, *et seq.*

The ruling of the court below is reversed and the action is dismissed.

Reversed.

H. W. WILLIAMSON AND J. E. THARRINGTON, D/B/AS WAKE OIL COMPANY, A PARTNERSHIP, v. H. L. MILLER, MRS. H. L. MILLER AND G. F. WICKER, TRADING AS MILLER OIL COMPANY AND/OR H. L. MILLER OIL COMPANY.

(Filed 19 April, 1950.)

1. Contracts § 8—

The rule that the construction given the contract by the parties in their course of dealing thereunder will be considered in its interpretation cannot be enlarged beyond the function of construction so as to supply provisions entirely omitted from the instrument.

2. Same—

It is the province of the courts to construe and not to make contracts for the parties.

3. Same—

Where there is no latent ambiguity in a contract, a patent defect of omission cannot be cured by matters *dehors* the instrument, and the construction of the contract is a matter of law for the court.

4. Contracts § 1—

A distributor's agreement for the sale of petroleum products which fails to stipulate in any part of the instrument the quantity of products to be sold and bought, and which nowhere binds the buyer to purchase exclusively from the seller, *is held* too vague and uncertain to give rise to a cause of action upon alleged subsequent breach on the part of the purchaser in handling the products of a competitor.

5. Contracts § 8—

A stipulation in a distributor's contract for the sale of petroleum products which gives the purchaser the right to display advertising matter furnished by the seller cannot be construed as making it obligatory upon the purchaser to display the advertising matter furnished.

DEFENDANT'S appeal from *Williams, J.*, January 1950 Term of WAKE Superior Court.

The plaintiffs, a partnership, resident in Wake County, engaged in the sale of oils and kindred products, brought this action against the defendants, a partnership trading as Miller Oil Company and/or H. L. Miller Oil Company, retailers of oil and other products, having their principal place of business in Wake Forest, in said County, to recover damages for breach of the contract copied *infra*. The plaintiffs filed their complaint setting forth that under a contract the defendants became "authorized retailers for Republic Oil products" in the localities set forth in said contract, these products to be purchased through plaintiff, upon the terms and during the periods appearing in the contract; and at the same time agreed "to use and display Republic trademarks

or marks, and that said advertising and display would be used in connection with Republic Oil products."

The complaint alleges that notwithstanding its agreement, on or about June 20, 1949, plaintiffs learned that the Republic Oil signs and "globes" were being removed from the premises and stations mentioned and that the defendants had ceased buying the same quantity of oil products; and that plaintiffs had notified the defendants by registered mail on June 17, 1949, that the defendants should strictly comply with their contract; and that notwithstanding the said notice the defendants entered into an agreement with another company for the sale of its products.

In a separate paragraph the complaint lists the number of gallons of its products and the products sold by it to the defendants allegedly under this contract, totaling a large quantity of the plaintiff's products. They allege that they are greatly damaged by loss of profits and by the fact that their advertising matter was not displayed as agreed.

Two agreements made simultaneously are, by exhibits thereto attached, made a part of the complaint and together constitute the contract the plaintiffs claim to have been breached. The parts of these agreements upon which the controversy hinges are quoted *infra*.

The first is entitled "Authorized Distributors Agreement"; pertinent parts are as follows:

> "This agreement made this 24th day of November 1947 between Wake Oil Company, a company operating in Wake County and existing under the laws of the State of North Carolina, hereinafter styled Wake Oil Co. and Miller Oil Co. of Wake Forest, County of Wake, State of North Carolina, hereinafter styled Buyer.
>
> "WHEREAS Wake Oil Co. is a marketer of Republic branded petroleum products, and
>
> "WHEREAS Buyer is desirous of obtaining the privilege of acting as an authorized distributor for Republic of such petroleum products through Wake Oil Co.
>
> "WITNESSETH:
>
> "PRODUCTS AND QUANTITY, Wake Oil agrees to sell and Buyer agrees to buy petroleum products of the kind and in the quantities listed below:

"PRODUCTS	QUANTITY PLUS OR MINUS 10%
Republic Ethyl Premium Gasoline	Gallons
Republic Royale Housebrand Gasoline	Gallons."

"PERIOD OF TIME:

"This agreement shall extend from November 18, 1947 to November 18, 1949; and unless either party shall give notice in writing to the other party at least ninety days prior to the end of the original term, this agreement shall continue in full force and effect for a further period of one year, and thereafter until either party shall give notice in writing to the other that this agreement shall terminate at the expiration of one hundred twenty days after the date of receipt of such notice."

"TRADE MARKS:

"Republic grants to the Buyer during the period of this agreement the right to use and display Republic's trade mark or marks, covering the products purchased from Wake Oil Co., but such right or privilege shall cease at the termination of this agreement.

"ADVERTISING:

"Republic shall loan to Buyer under separate bailment agreement, the globes or lenses required for gasoline and kerosene dispensing equipment used by Buyer or Buyer's customers in the distribution of such products purchased through Wake Oil Co. at Republic's option may also loan to Buyer, under separate bailment agreement, Republic's approved advertising signs. Buyer shall supply all other dispensing equipment and advertising signs."

Intervening and omitted parts of the contract relate to the price, claims for shortage, etc.

Pertinent parts of the "Bulk Sales Agreement" are as follows:

"Quantity. Wake Oil Co. agrees to sell and Buyer agrees to purchase the following petroleum products:

Grade	QUANTITY PLUS OR MINUS 10%	
Republic Brite Lite Kerosene	.....	.....
Republic #2 Furnace Oil	.....	.....
	Necessary Requirements	Bulk and Canned
Recolene Motor Oil	"	"
Ekonomee Motor Oil	"	"
Republic Motor Oil	"	"

Grease may be purchased at option of Buyer.

"PERIOD OF TIME: This agreement shall become effective on the 18th day of November 1947 and continue through November 18, 1949 in full force, and thereafter from year to year upon the same terms and conditions, unless either party shall give notice in writing to the other party at least ninety days prior to the end of the original term, this agreement shall continue in full force and effect for a further period of one year, and thereafter until either party shall give notice in writing to the other that this agreement shall terminate at the expiration of one hundred twenty days after the date of receipt of such notice."

"CONSTITUTES WHOLE AGREEMENT: This instrument embodies the whole agreement between the parties and there are no oral promises or other understandings or conditions inducing its execution or qualifying its terms."

The defendants demurred to the complaint as not stating a cause of action, as follows:

"Now Come the defendants H. L. Miller, Mrs. H. L. Miller and G. F. Wicker, and demur to the complaint of the plaintiffs and move to dismiss the action, and, for grounds of demurrer and dismissal, respectfully show the Court:

"1. That the complaint fails to show a cause of action against these defendants for that it alleges that the said defendants purchased products from the plaintiffs under the purported contract in August 1949, and that summons was issued by the plaintiffs on September 1, 1949, and served on these defendants on September 1, 1949; therefore, these defendants have complied with the purported contract alleged by the plaintiffs.

"2. That the complaint fails to state a cause of action against these defendants for that the plaintiffs' Exhibit A, the purported contract on which this action is based, is not a valid and enforceable contract in that it is so vague, indefinite and uncertain in its terms that the Court cannot determine therefrom the exact meaning of said purported contract, or fix definitely the liability of the parties thereto, in that said purported contract does not provide for the sale and delivery of any specified quantity of merchandise by the plaintiffs to the defendants, and does not provide for the purchase and acceptance by said defendants of any specific or measurable quantity of merchandise from the plaintiffs, and said purported contract does not require the defendants to use any trade marks or advertising belonging to the plaintiffs, as alleged in the complaint, and in that

the provisions of said purported contract, with respect to price, are so vague, indefinite and uncertain that they are unenforceable."

On the hearing Williams, J., overruled the demurrer, allowing defendants 30 days in which to file answer on other pleadings.

From this judgment the defendants appealed, assigning as error the rendering of the judgment as set out in the record.

Ellis Nassif for defendant, appellant.
Broughton, Teague & Johnson for plaintiff, appellee.

SEAWELL, J. The gravamen of plaintiff's action, as stated in the complaint, is found to be as follows: (1) That the defendants violated their agreement to purchase oil and other mentioned products from the plaintiff, thereby causing the latter loss in profits, and because of their investment in the construction of a bulk plant and the purchase of trucks to supply defendants with products; and (2) that the defendants have broken their agreement to display on the premises plaintiff's trade marks and advertising matter, causing further damage and loss. Total damages are claimed in the sum of $25,000, which includes profits on prospective sales from June 1949 until November 24, 1950. The two instruments entitled "Authorized Distributors Agreement" and "Bulk Sales Agreement" simultaneously executed and referring to the same subject, are considered together and will be referred to as "the contract." They are by reference made a part of the complaint.

The plaintiffs, of course, cannot recover unless the purported contract was valid, binding, and enforceable in respect to those duties, the nonperformance of which is alleged as a breach constituting the exclusive cause of action.

Since the contract is made a part of the complaint, and is alleged as the sole basis of recovery, the Court will look to its particular provisions rather than the more broadly stated allegations in the complaint, or the conclusions of the pleader as to its character and meaning. Upon proper construction of these writings depends the propriety of the judgment overruling the demurrer.

1. It does not appear on the face of the contract that defendant agreed to purchase any specified quantity of oil or other mentioned products at all, at any time, or during any specified period within the "life of the contract."

The contract upon which the plaintiffs rely states with reference to this question:

"Products and Quantity, Wake Oil agrees to sell and Buyer agrees to buy petroleum products of the kind and in the quantities listed below:"

and immediately below the above quotation it sets out the products and the quantity as follows:

"Products

Republic Ethyl Premium Gasoline .....Gallons

Republic Royale Housebrand Gasoline .....Gallons."

We find no reference to the quantity of products to be sold and bought in any other part of the contract. Both instruments constituting the contract have exactly the same omission with respect to the obligation of the defendants in this regard, and neither party to the "agreement" is any more bound than the other.

The appellees argue that the contract must be construed "from the four corners" but fail to point out any provision elsewhere in the contract that could reasonably supply the omission. "Looked at" from the four corners it is still a blank.

The plaintiffs sought to close the gap by setting up in their pleading that during a certain period they sold, and defendants bought, substantial quantities of the products mentioned in the contract, naming the amounts. The theory on which these allegations are laid is reflected here in the argument of the appellees that the course of dealing between the parties constitutes a practical construction placed by them on the contract and generates an inference which would save the contract from defeat and also supply a standard for measure of damages.

It is true that in a situation of doubtful interpretation of some expression found in an executory contract the *modus vivendi* or course of dealing between the parties, may have a bearing on its construction; but we have never known the principle applied to a wholesale amendment to the contract where there is no expression of the reciprocal duties to be construed. "The rule as to consideration of the construction placed on a contract by the parties is, of course, inapplicable where there is no binding contract." 17 C.J.S., "Contracts," sec. 325, p. 762. "Where a term of a contract is lacking, resort may not be had to the acts or conduct of the parties not in terms amounting to an agreement for the purpose of supplying it." 12 Am. Jur., "Contracts," sec. 249, p. 791.

We are reminded that it is the province of the Court to construe and not to make contracts for the parties. *Belk's Dept. Store v. Geo. Washington Fire Ins. Co.*, 208 N.C. 267, 180 S.E. 63.

The contract makes the buyer an authorized distributor of plaintiff's products but it nowhere binds him to purchase exclusively from the plaintiff or to deal exclusively in their products. Such a contract might have implications which the parties sought to avoid. But we need not speculate on this. The matter omitted from the contract is so important,

forming as it does the very basis of plaintiff's claim, that it must be left to treaty between the parties, by which alone, and not by judicial amendment, could there be brought about that meeting of the minds which is essential to any contract. *Elks v. Ins. Co.,* 159 N.C. 619, 75 S.E. 808; *Croom v. Goldsboro Lumber Co.,* 182 N.C. 217, 108 S.E. 735; *Sides v. Tidwell,* 216 N.C. 480, 5 S.E. 2d 316.

Here there is no latent ambiguity to be explained by matter *dehors* the record but there is a patent defect which cannot be cured by extraneous reference or matters not within the document. Its construction becomes a matter of law for the Court.

The challenge to the vagueness in the contract goes to its sufficiency as giving rise to a cause of action. Breach of an invalid contract, if that paradox could exist, gives rise to no cause of action. *Elks v. Ins. Co., supra,* loc. cit. p. 626: "If no breach in the contract could be assigned which could be measured by any test of the damages from the contract it has been said to be too indefinite to be enforceable," citing Page on Contracts, sec. 28. "To be binding, the terms of a contract must be definite and certain or capable of being made so." *Elks v. Ins. Co., supra; Sides v. Tidwell, supra.*

"If the uncertainty as to the meaning of a contract is so great as to prevent the giving of any legal remedy, direct or indirect, there is no contract." *Carver v. Brien,* 315 Ill. App. 643, 43 N.E. 2d 597; *Van Slyke v. Broadway Ins. Co.,* 115 Cal. 644.

For the reasons given we are of the opinion that the terms of the alleged contract in this vital particular are too vague and uncertain to give rise to any cause of action which could survive the demurrer.

2. Referring now to the contention that the defendant breached the terms of the contract with reference to the display of plaintiff's signs and advertising matter, an inspection of the contract does not bear out plaintiff's contentions that it was obligatory on the part of the defendant to do so. The language used in the contract with reference to these items gives the defendants the right to use the plaintiff's "globes" and to display advertising matter of the plaintiff but does not require them to do so.

For the reasons assigned, the judgment of the court below overruling defendant's demurrer must be reversed. It is so ordered.

Reversed.

MRS. ROSA HARVELL MOORE v. CAROLINA CASUALTY INSURANCE COMPANY.

(Filed 19 April, 1950.)

1. Pleadings § 15—

A demurrer should not be sustained if the pleading as a whole states facts sufficient to constitute a cause of action.

2. Same—

A demurrer to a single paragraph of the complaint on the theory that such paragraph attempts to set up a second, separate cause of action and fails to state facts sufficient for that purpose, is improvidently granted when the pleading considered as a whole sufficiently states but a single cause of action and the paragraph objected to merely sets forth additional elements of damage, defendant's proper procedure to test plaintiff's right to recover such additional elements of damage being by objection to evidence offered in support thereof.

APPEAL by plaintiff from *Harris, J.*, at the November Term, 1949, of WAKE.

Civil action involving a policy of insurance providing partial indemnity for expense of surgical treatment and hospitalization occasioned by accidental bodily injuries or by sickness occurring under certain specified conditions.

After the plaintiff had filed a complaint and three amendments thereto containing a grand total of nineteen paragraphs, and after the defendant had fully answered all of the allegations of the plaintiff, the defendant demurred *ore tenus* to a single paragraph of the plaintiff's pleadings, to wit, paragraph (b) of the third amendment to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action. G.S. 1-127 (6). The court sustained the oral demurrer, and the plaintiff excepted and appealed, assigning error.

E. D. Flowers and Robert W. Brooks for plaintiff, appellant.

Harris & Poe for defendant, appellee.

ERVIN, J. Although the pleadings in this case are both numerous and voluminous, a detailed analysis of their contents is not necessary to the decision of the only question rightly raised by the appeal, *i.e.*, whether the court below properly sustained the oral demurrer directed to only one of the nineteen paragraphs in the plaintiff's pleadings.

This ruling is necessarily based on the theory that the plaintiff undertakes to sue upon two separate causes of action; that one of these causes of action is insufficiently asserted in paragraph (b) of the third amendment to the complaint; and that the other of these causes of action is

effectually stated in the remaining eighteen paragraphs of the plaintiff's pleadings.

The court has misinterpreted the allegations of the plaintiff; for she undertakes to state only one cause of action against the defendant. When her pleadings are read as a whole, it appears that the plaintiff elects to treat the insurance contract as wrongly broken and ended by the defendant, and that she alleges a good cause of action against the defendant for the recovery of damages resulting from its wrongful cancellation or repudiation. *Abrams v. Insurance Co.,* 224 N.C. 1, 29 S.E. 2d 130, and 223 N.C. 500, 27 S.E. 2d 148; *Garland v. Ins. Co.,* 179 N.C. 67, 101 S.E. 616; *Trust Co. v. Insurance Co.,* 173 N.C. 558, 92 S.E. 558. See, also, 45 C.J.S., Insurance, section 465; *Levy v. Massachusetts Acc. Co.,* 124 N. J. Eq. 420, 2 A. 2d 341; *Pacific Mut. Life Ins. Co. of California v. Rhame,* 32 F. Supp. 59.

Paragraph (b) of the third amendment to the complaint does not purport to assert a separate cause of action, or to vary in any degree the cause of action stated in the other eighteen paragraphs of the plaintiff's pleadings. It merely enumerates additional elements or items allegedly going to make up the sum total of the damages resulting from the wrongful cancellation or repudiation of the policy. We express no opinion as to whether such additional elements or items are recoverable by the plaintiff in this action; for lawsuits are to be tried as a whole and not as fractions. The defendant can adequately protect any rights it may have in this connection by objecting to any testimony which the plaintiff may present at the trial to establish the additional elements or items.

It is an established rule of pleading in this jurisdiction that "when there is but one cause of action, or but one defense, a demurrer must cover the whole ground, or else it will be a nullity." *Sumner v. Young,* 65 N.C. 579. This being true, "a demurrer will not lie to a single paragraph of a complaint, declaration, or petition on the ground that it does not state facts sufficient to constitute a cause of action, if the pleading as a whole states sufficient facts to constitute a cause of action." 41 Am. Jur., Pleading, section 231.

For the reasons given, the judgment sustaining the oral demurrer is Reversed.

MERCHANTS & FARMERS BANK OF LANDIS, NORTH CAROLINA, A CORPORATION, AND O. R. BLACK, TRUSTEE, v. MAE OLA HEINTZ SHERRILL AND J. C. SHERRILL.

(Filed 19 April, 1950.)

1. Mortgages § 5: Deeds § 5—

The introduction in evidence by plaintiff of recorded deed of trust with recitals showing purported signatures of the trustors duly acknowledged, probated and recorded, raises the presumption of due execution, signing and delivery, and the testimony of the *feme* trustor that she did not sign the instrument, even though not contradicted by oral testimony, does not warrant a peremptory instruction in her favor, the matter being for the determination of the jury upon the evidence under appropriate instructions from the court.

2. Estoppel § 7—

The power of a married woman to effect a conveyance of her real property by estoppel *in pais* is delimited by Art. X, sec. 6, of the Constitution of North Carolina.

APPEAL by plaintiffs from *Bennett, Special Judge,* December Term, 1949, of CABARRUS. New trial.

L. E. Barnhardt and Hugh Q. Alexander for plaintiffs, appellants.
John C. Kesler for defendant, appellee.

DEVIN, J. Plaintiff Bank instituted action to foreclose a deed of trust purported to have been executed by defendants to secure a note of $4,000, which it is alleged is overdue and unpaid. The *feme* defendant answered that the real property described in the complaint was her own and that she had not signed the note or deed of trust, alleging forgery. Plaintiff replied that if the papers were forged the *feme* defendant with knowledge of the forgery had failed for two years to so advise plaintiff and had accepted the benefit of the cancellation of a prior deed of trust of $3,000 from the proceeds of the $4,000 loan, and that she was now estopped to deny validity of the deed of trust sued on. Defendant rejoined that the prior deed of trust referred to was also a forgery.

Plaintiff offered in evidence the record of the deed of trust, reciting the indebtedness of defendants and the execution of the note, and showing the purported signature, acknowledgment and private examination of *feme* defendant. Plaintiffs also offered oral testimony that the note and deed of trust, the property of the plaintiff Bank, were due and unpaid. The *feme* defendant testified she did not sign the instruments sued on, or the prior deed of trust referred to in the reply, and that as soon as she discovered the Bank held the papers she sought without success to

induce her husband to pay the balance due; that she was not now living with her husband, and had received no benefit from either of the notes or deeds of trust referred to.

Issues were submitted as to the execution by the *feme* defendant of the two deeds of trust referred to in the pleadings, and the jury was instructed to answer these issues no, if they found the facts to be as all the evidence tended to show. Verdict was returned accordingly and the plaintiffs excepted and appealed.

We think there was error in giving to the jury the instructions complained of. The introduction by the plaintiff of the recorded copy of the deed of trust sued on (G.S. 8-18), with its recitals, showing the purported signatures of the defendants duly acknowledged, probated and recorded, together with proof that the debt secured was due and unpaid, made out a *prima facie* case for the plaintiffs. The record raised the presumption of due execution, signing and delivery of the deed of trust. *Belk v. Belk,* 175 N.C. 69 (72), 94 S.E. 726; *Best v. Utley,* 189 N.C. 356 (364), 127 S.E. 337; *Johnson v. Johnson,* 229 N.C. 541 (545), 50 S.E. 2d 569.

The burden was on the *feme* defendant to rebut this presumption, *Johnson v. Johnson, supra.* She testified she did not sign the written instruments referred to, and that her purported signatures thereon were forged. True, this evidence was not contradicted by oral testimony, but it left the matter open for the jury to determine the credibility and weight of the evidence under appropriate instructions from the court. G.S. 1-180; *Perry v. Trust Co.,* 226 N.C. 667, 40 S.E. 2d 516; *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 892.

In view of the holding of this Court in *Buford v. Mochy,* 224 N.C. 235, 29 S.E. 2d 729, it would seem that the power of a married woman to effect a conveyance of her real property by estoppel *in pais* is delimited by Article X, sec. 6, of the Constitution of North Carolina.

New trial.

CLARA C. STALLINGS v. OCCIDENTAL LIFE INSURANCE COMPANY.

(Filed 19 April, 1950.)

APPEAL by defendant from *Hatch, Special Judge,* November Term, 1949, of FRANKLIN. No error.

Suit on a life insurance policy. From judgment on the verdict in favor of plaintiff, the defendant appealed.

E. C. Bulluck for plaintiff, appellee.
Smith, Leach & Anderson for defendant, appellant.

PER CURIAM. This case was here at Fall Term, 1948, (229 N.C. 529, 50 S.E. 2d 292), and again at Spring Term, 1949, (230 N.C. 304, 53 S.E. 2d 90). It was held on both former appeals that the conflicting evidence presented a case for the jury on the determinative issue whether the policy was delivered absolutely or for the purpose of inspection only. This question was submitted to the jury on substantially the same evidence as that heretofore offered, in a charge free from prejudicial error, and answered in favor of the plaintiff.

We see no compelling reason to disturb the result.

No error.

GEORGE W. MORDECAI, FRANK F. MORDECAI AND SAMUEL F. MORDECAI, CO-PARTNERS TRADING AS HAYES-BARTON SWIMMING POOL, v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 19 April, 1950.)

APPEAL by plaintiff from *Grady, Emergency Judge,* November Term, 1949, of WAKE. No error.

Plaintiffs instituted this action to recover damages for injury to their property by water alleged to have resulted from the negligent construction and maintenance by the defendant of a culvert and drainway under its roadbed, insufficient to carry off the waters flowing through a small stream when swollen by rain. It was alleged that following heavy rains water was backed up over plaintiffs' land causing substantial damage. Defendant denied negligence and further alleged that any injury suffered by plaintiffs was caused by an unprecedented and unpredictable downpour, constituting an act of God for which defendant was not liable.

The following issue was submitted to the jury: "Were the lands of the plaintiffs flooded and their property injured by the negligence of the defendant as alleged in the complaint?" The jury answered the issue "No," and from judgment on the verdict, the plaintiffs appealed.

Cheshire & Ellis for plaintiffs, appellants.
Simms & Simms for defendant, appellee.

PER CURIAM. Plaintiffs noted numerous exceptions to the judge's charge, but a careful examination of the record leaves us with the im-

pression that the case was fairly submitted to the jury, and that no error which would warrant us in awarding a new trial has been disclosed. We are not inclined to disturb the result.

No error.

SHANNON B. LONG v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 19 April, 1950.)

APPEAL by defendant from *Harris, J.*, at October Term, 1949, of WAKE.

Civil action to recover damages for personal injuries resulting from the alleged negligent acts of the defendant.

The defendant, in apt time, filed a motion to strike certain allegations from the complaint, on the ground that they are "irrelevant, redundant and indefinite, and are statements of conclusions and not facts."

The court below being of the opinion the motion should not be granted, denied it and entered judgment accordingly.

The defendant appeals and assigns error.

Douglass & McMillan for plaintiff.

Murray Allen for defendant.

PER CURIAM. We concur in the ruling of the court below and affirm the judgment, on the authority of *Long v. Love,* 230 N.C. 535, 53 S.E. 2d 661.

Affirmed.

STATE v. ANALPHUS LEE TILLEY.

(Filed 19 April, 1950.)

APPEAL by defendant from *Frizzelle, J.*, and a jury, at October Term, 1949, of WAKE.

The defendant was charged with aiding and abetting one Allen Dickens in the commission of a misdemeanor, to wit, the unlawful operation of a motor vehicle upon a public highway while under the influence of intoxicating liquor. The jury found the defendant guilty as charged, and the court imposed judgment on the verdict. The defendant appealed, assign-

ing the refusal to dismiss the action upon a compulsory nonsuit and certain excerpts from the charge as error.

Attorney-General McMullan and Assistant Attorney-General Rhodes for the State, appellee.

W. Brantley Womble for defendant, appellant.

PER CURIAM. The testimony of the prosecution was sufficient to take the case to the jury and to support a verdict for the State. *S. v. Gibbs,* 227 N.C. 677, 44 S.E. 2d 201. Consequently the court rightly refused to dismiss the action upon a compulsory nonsuit under G.S. 15-173. When it is read as a whole, the charge is free from legal error. *Wyatt v. Coach Co.,* 229 N.C. 340, 49 S.E. 2d 650.

No error.

THE FOLLOWING CASES WERE DISPOSED OF WITHOUT WRITTEN OPINIONS:

Dark v. Graham. Appeal by plaintiff from *Stevens, J.,* June Civil Term, 1949, of WAKE. Appeal dismissed for want of merit, 2 November, 1949.

S. v. Dover; S. v. Carpenter; S. v. Stinnett. Appeals by defendants from *Armstrong, J.,* April 25th Term, 1949, of GASTON. Motion of State in each case to dismiss the appeals granted for that (1) The case on appeal does not clearly state and number the exceptions as required by Rule 21 and by G.S. 1-282; (2) The brief does not comply with Rule 27½ requiring the appellant to state the questions involved on the appeal in such a way as to enable the Court "to obtain an immediate view and grasp of the nature of the controversy." 23 November, 1949.

S. v. Taylor. Appeal by the State from *Horton, S. J.,* November Mixed Term, 1949, of LENOIR. Motion to affirm judgments of nonsuit and dismiss appeal allowed. 28 March, 1950.

Hospital v. Joint Committee on Standardization. First appeal by defendants from *Armstrong, J.,* 17 September, 1949, at chambers in TROY. Second appeal by defendants from *Armstrong, J.,* 28 January, 1950, at chambers in TROY. Motions to dismiss appeals allowed on grounds that questions raised are moot. 29 March, 1950.

APPENDIX.

IN RE WILL OF FRANKS.

(Filed 31 January, 1950.)

1. Appeal and Error § 22—

The record imports verity, and is binding upon the Supreme Court.

2. Appeal and Error § 43—

Affidavits of witnesses, tending to show facts in material respects different from their testimony as it appears in the record of the case on appeal, cannot be considered on petition to rehear, since the Supreme Court is bound by the record as filed.

PETITION by caveators to rehear this case as reported in *ante,* 252.

The *Justices* to whom the petition was referred filed the following memorandum in passing upon the petition:

Simms & Simms for petitioners.

DEVIN and SEAWELL, JJ., considering the petition to rehear.

The petitioners filed with their petition to rehear the affidavits of two persons who had testified at the trial tending to show facts in material respects different from their testimony as it appears in the record of the case on appeal. The affidavits relate to the attestation of the paper writing propounded as the will of the decedent. Upon these affidavits two members of the bar have filed certificates under Rule 44 (2) in support of the petition to rehear, basing their action on the suggestion that if petitioners be given opportunity to change the record to conform to these affidavits, a different result would follow.

However, the record of the case which was agreed to by counsel, duly certified below, and filed in this Court as the case on appeal, and upon which, without objection, the cause was argued here, and the decision of this Court rendered, imports verity and is binding upon the Court. *S. v. Dee,* 214 N.C. 509; *Gorham v. Ins. Co.,* 215 N.C. 195. Hence the affidavits now filed cannot be considered on the petition to rehear. Nor are the matters set out in the affidavits sufficient to come within the rule as to newly discovered evidence set out in *Johnson v. R. R.,* 163 N.C. 431 (453); *Bullock v. Williams,* 213 N.C. 320; *Utilities Com. v. R. R.,* 224 N.C. 762.

An examination of the petition to rehear, in connection with the decision of this Court heretofore rendered and reported in 231 N.C. 252, fails to disclose any error in law thereon, or matter overlooked.

The petition to rehear is denied.

APPENDIX.

MARGARET M. ELEDGE, ADMINISTRATRIX OF JOHN ELEDGE, v. CAROLINA POWER & LIGHT COMPANY (ORIGINAL PARTY DEFENDANT), AND M. B. HAYNES AND COAL OPERATORS CASUALTY COMPANY (ADDITIONAL PARTIES DEFENDANT).

(Filed 2 February, 1950.)

Master and Servant § 41—

The decision that a third person tort-feasor is not entitled to set up the indemnity contract of the employer as a cross-action against the employer and its insurance carrier in an action by the personal representative of the deceased employee, does not rule that contracts of indemnity against liability for negligence are invalid.

PETITION by defendant, Carolina Power & Light Company, to rehear this case, reported in 230 N.C. 584. The *Justices* to whom the petition was referred filed the following memorandum in passing upon the petition:

R. F. Phillips; Robinson & Morgan, and A. Y. Arledge for petitioner.

WINBORNE and ERVIN, JJ., considering the petition to rehear.

Careful consideration of the petition leads us to the conclusion that it should be denied. Observations in the opinion must be read in the light of the matters appearing in the present record. The decision is not to be construed to lay down any general rule invalidating contracts for indemnity against consequences of future acts of negligence.

Petition denied.

ADDRESS OF R. P. READE

PRESENTING THE PORTRAIT

OF

JAMES SMITH MANNING

TO

THE SUPREME COURT

APRIL 11, 1950

May it please Your Honors: Because of the esteem which I entertained for him while he lived, and my respect for his memory now that he is gone, the privilege of presenting his portrait to this Court has been afforded me by Mrs. James Shepard Milliken, a daughter of the late Justice James Smith Manning. There are those of his contemporaries who could pay more eloquent tribute to his memory as a citizen, lawyer and jurist than I, but there is no one who has a deeper sense of appreciation of his fine contribution to the economic, political and judicial life of the State of North Carolina.

Justice Manning was well born, well educated, and well equipped when he began his life work. He was the second son of John and Louisa Hall Manning. His paternal grandfather, John Manning, was born in North Carolina, and in young manhood joined the United States Navy, in which he held the rank of Captain at the time of the outbreak of the War between the States. When North Carolina seceded from the Union he immediately resigned his commission to offer his services to the Confederacy. A great uncle, the Honorable Thomas C. Manning, was Chief Justice of the Supreme Court of Louisiana and Minister to Mexico.

John Hall, the maternal great-grandfather of Justice Manning, was one of the first three Justices of the Supreme Court presiding after its permanent organization. He continued as a member of this Court until his death.

The Honorable John Manning, the father of Justice Manning, was born in Edenton, North Carolina, and when a young man enlisted in the Confederate service at the outbreak of the War, rose to the rank of Lieutenant. In 1861 he was elected a delegate to the Secession Convention and for many years thereafter was active in State politics. In 1879 he was elected to Congress to fill the unexpired term caused by the death of Congressman Gilliam. In 1875 he served as a member of the Constitutional Convention of the State, and in 1881 was elected to the State Legislature, and was appointed a member of the Committee of

Three chosen to codify the laws of the State of North Carolina. Upon the death of the Honorable Joseph A. Englehard he was tendered the position of Secretary of State by Governor Jarvis but declined the appointment, and also later declined appointment to the Superior Court Bench. In 1881 he was unanimously elected Dean of the Law School of the University of North Carolina, where he served with distinction and ability until his death in February 1899.

It is not surprising, therefore, that one of such noble lineage and cultural background should ultimately take high position in the life of the State. Justice Manning was born in Chatham County, North Carolina, on June 1, 1859. He attended a private school in Pittsboro, after which he entered the University of North Carolina in the Fall of 1875 and was graduated in 1879 with the degree of Bachelor of Arts. He was a member of the first four-year class graduating from the University after it reopened following the Civil War. He taught school for two years in the Morson and Denson Academy in Pittsboro, after which time he studied law under his father, and at the October Term of the Supreme Court of North Carolina in the year 1882 he was admitted to the Bar, at which time he entered upon a long and distinguished career. On January 1, 1883, about two years after the formation of Durham County, he located in Durham, North Carolina, and opened his first law office. Early in his professional career he gave unmistakable evidences of those qualities that marked him for leadership at the Bar, as a private citizen and a public servant. He was a tireless worker, and was endowed with a fine intellect, which he continued to cultivate. He likewise possessed character, stability, and solidarity. Young Manning was genuine and dependable, qualities that were magnified in him through the passing years and which continued to attract to him a host of friends from all walks and stations in life.

Although Durham had a relatively small Bar it had a strong one. As his contacts broadened, his influence was extended to where he became one of the dominant forces in the community. He further demonstrated his ability as a lawyer and fought his way to the top of his profession in the State, which proud position he maintained during his entire professional career.

With him the practice of law was always a profession. No act of his tended to cheapen or commercialize it. The trial of a lawsuit with him was never a case of bluff or a game of chance, but a legal battle with plans of attack and lines of defense. He did not depend upon his wits or his skill to win a case, but rather the strength of his legal position and the correctness of the facts upon which his case was bottomed.

In his appearances in the Courts he was always deferential to the Presiding Judge, courteous and polite to opposing counsel, considerate

of and respectful to witnesses. He believed in the dignified and orderly administration of justice. He loved the profession and was true to its traditions. He was always mindful of the fact that he too was an officer of the court. He was a forceful and aggressive advocate, a safe and wise counselor. His clients had implicit confidence in him, and his brethren knew they could rely upon every word he said. With him the court room was not a place for petty quibbling or bickering. He despised sham, pretence, hypocrisy and deception, whether in a court room or in the market place, and looked with scorn upon the lawyer who stooped to engage in sharp practice. He was always modest in victory and accepted defeat without bitterness. His open, frank demeanor in the Courts won for him the esteem and confidence of Judges, the admiration of his antagonists, and the respect of court officials and jurors alike.

Although his busy life was crowded with the affairs of a large clientele, he had the happy faculty of being able to leave his work on his desk at the close of the day, to enjoy with his loved ones the atmosphere of a perfect home, made possible by a devoted and affectionate wife and the love of happy, rollicking children, who were to him an ever-increasing source of pleasure. His capacity for friendship was one of the dominating forces of his life. He loved to spend himself in the service of his friends.

On December 12, 1888, he was married to Miss Julia Tate Cain, of Hillsboro, North Carolina, who was the daughter of Doctor James F. Cain, a prominent practicing physician. To this happy union six children were born: John Hall, now serving his second term as United States District Attorney for the Eastern District of North Carolina; James S., Jr., now deceased, who was Captain of Headquarters Company in the 322nd Infantry, 81st Division, which saw service in France in the First World War; Frederic Cain, who died of influenza while serving in France with the American Army in the First World War; Julia, the wife of J. B. Powell of Raleigh, North Carolina; Annie Louise, the wife of Doctor James Shepard Milliken of Southern Pines, North Carolina; and Sterling C., of Raleigh, North Carolina.

Justice Manning and the members of his family were members of the Episcopal Church.

Although he was always active and influential in the councils of the Democratic Party, he never held elective office until 1907, when he represented Durham County in the General Assembly, and again in 1909 when he was elected to the State Senate. In both branches of the General Assembly he served with ability and distinction.

Although always regular in his Party affiliation, when factional differences began to arise in the ranks of the organization, Manning

aligned himself with that wing of the Party sometimes designated as the "Progressive," which was led in the campaign of 1908 by W. W. Kitchin, of Person County. When Kitchin became a candidate for Governor he persuaded Manning to assume the management of his campaign. Headquarters for Kitchin were opened in Durham many months before the Democratic Convention assembled in Charlotte on June 24, 1908. He displayed great skill and political acumen in assisting in the alignment of the Kitchin forces over the State, and at the Convention in Charlotte in June 1908, after a long and bitter contest, the militant forces led by Manning succeeded in nominating Kitchin for Governor.

In 1909, when Justice Henry Groves Connor was appointed United States District Judge for the Eastern District of North Carolina, Judge Manning was appointed by Governor Kitchin to fill the vacancy on the Supreme Court occasioned by Judge Connor's resignation. The co-partnership that had existed between Judge Manning and H. A. Foushee since its formation in 1893 was dissolved. Judge Manning took office on June 3, 1909, and served until January 1911. He came to the Bench at the height of his physical and mental faculties. His wide and varied experience at the Bar, his knowledge of the decided cases, enabled him to ably discharge the duties of this high office. He maintained the high standard established by those who had preceded him as members of this Court. His opinions are found in Volumes 151, 152, 153 and 154 of the North Carolina Reports.

In January 1911 he again resumed the practice of law in Durham, North Carolina, where he was associated with R. O. Everett, Esq., under the firm name of Manning and Everett. This partnership continued until February 1913, when he and former Governor Kitchen both moved to Raleigh, where they engaged in the general practice of law under the firm name of Manning and Kitchin.

In 1916 he was again called to high office, when nominated and elected Attorney General of the State of North Carolina. This office was held by him for two successive terms at the end of which he refused to be a candidate for a third term. After Governor Kitchin's health failed and he retired from the practice of law, Judge Manning formed a partnership with Governor Bickett, who had just completed his term of office as Governor. This association lasted for less than a year, due to the sudden death of Governor Bickett. In the Spring of 1922 his oldest son, John Hall Manning, joined him in the practice of law under the firm name of Manning and Manning, which association continued until his death on July 28, 1938.

During a long and successful career, Judge Manning held numerous positions of trust and responsibility, notably among them Trustee of

the University of North Carolina for many years, where he served on its Executive Committee. His life was characterized by right living and high thinking. He was a typical example of the best in North Carolina Citizenship.

It has been truthfully said that the Supreme Court of North Carolina, from its organization, has justly held the respect and confidence of the people more steadfastly than any other branch of the State Government. This is partly due to its power and the fact that it is the head of one of the departments in Government established by the Constitution. It is chiefly due, however, to the character and ability of the Judges who have been members of this Court. They have performed the duties of their office so ably and impartially that they have endeared themselves to the State and are justly entitled to be numbered among its great builders. Their names will be revered as long as the profession which they ennobled shall endure.

Judge Manning contributed greatly to this rich heritage. His portrait is presented by his devoted daughter so that it may take its proper place among the portraits of other distinguished and beloved Judges of North Carolina.

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING THE PORTRAIT OF THE LATE ASSOCIATE JUSTICE JAMES S. MANNING IN THE SUPREME COURTROOM, 11 APRIL, 1950.

The Court is pleased to receive this splendid portrait of the late Associate Justice James S. Manning, who sat as a member of this Court from June 1909 to December 31, 1910. His opinions appear in Volumes 151 to 154, of the Supreme Court Reports and clearly reveal his quality of mind and the careful student that he was. Closely reasoned, well written and always to the point, they go to make up his contribution to the Judicial Annals of North Carolina.

In addition, Justice Manning was associated with the Court as Attorney General from 1917 to 1925. Add to this his more than fifty years at the Durham and Raleigh Bars, and a record of solid achievement emerges which entitles him to a permanent place in the annals of his time. We are glad to have him return to us in remembrance today.

The Marshal will see that the portrait is hung in its appropriate place, and these proceedings will be published in the forthcoming volume of the Reports.

WORD AND PHRASE INDEX.

Abandonment—Of child by parent, *In re Adoption of Doe*, 1; *In re Cranford*, 91; *S. v. Stone*, 324; of wife, *S. v. Stone*, 324.

Abatement and Revival—Procedure to raise question of pendency of prior action; *Reece v. Reece*, 321; termination of prior action, *Prentzas v. Morrow*, 330; identity of actions, *Reece v. Reece*, 321; *Brothers v. Bakeries*, 428.

Abatement of Nuisances—See Nuisances.

Accomplice—Instruction on scrutiny to be given testimony of, *S. v. Hale*, 412.

Actions—Joinder of causes see Pleadings, joinder of parties see Parties; parties separately polluting stream may be joined in one action, *Stowe v. Gastonia*, 157; *McKinney v. Deneen*, 540; proceedings under Declaratory Judgment Act, see Declaratory Judgment Act; abatement of subsequent actions, see Abatement and Revival; for wrongful death, see Death; requirement that action on fire policy be instituted within 12 months *held* waived, *Meekins v. Ins. Co.*, 452; distinction between actions in tort and on contract, *Lamm v. Shingleton*, 10; time of commencement of action, *Davis v. Rhodes*, 71; *Bumgarner v. Bumgarner*, 600.

Additional Instructions—Where verdict is not responsive court may give additional instructions and have jury reconsider, *S. v. Matthews*, 617.

Ademption—Of specific legacies, *Green v. Green*, 707.

Administrators—See Executors and Administrators.

Admissions—Introduction of deed in evidence admits execution but not its legal effect, *McDowell v. Staley*, 65; silence as implied admission of guilt, *S. v. Rich*, 696.

Adoption—*In re Adoption of Doe*, 1.

Advisory Opinions—Not within scope of Declaratory Judgment Act, *Lide v. Mears*, 111.

Aiders and Abettors—*S. v. Church*, 39; *S. v. Perry*, 467; *S. v. Matthews*, 617.

Airplanes—Liability of flying service for injury to gratuitous passenger, *Bruce v. Flying Service*, 181; authority of patrolmen to use plane in search for fugitive, *Galloway v. Dept. of Motor Vehicles*, 447.

Airport—As constituting nuisance, *Barrier v. Troutman*, 47.

Alimony—See Divorce and Alimony.

Alteration of Instruments—*Johnson v. Orrell*, 197.

Amendment—To pleadings, *Light Co. v. Bowman*, 332; *Allen v. Costner*, 340; *Perkins v. Langdon*, 386; *Casstevens v. Casstevens*, 572; *Davis v. Rhodes*, 71; to warrant, *S. v. Carpenter*, 229; *S. v. Stone*, 324; *Carson v. Doggett*, 629; of process, *Electric Membership Corp. v. Grannis Bros.*, 716.

Anguish—As element of damage for breach of contract, *Lamm v. Shingleton*, 10.

Answer—See Pleadings.

Anticipation of Negligence—Driver is not required to anticipate negligence of others, *Bobbitt v. Haynes*, 373.

Apartment House—Liability for pedestrian's fall on snow and sleet in front of, *Browder v. Winston-Salem*, 400.

Appeal and Error—In criminal cases, see Criminal Law; appeals to Superior Court from referee, *Cherry v. Andrews*, 261; appeal from Employment Security Commission, *Employment Security Com. v. Jarrell*, 381; right of appeal, *Veazy v. Durham*, 357; judgments appealable, *Parker v. Helms*, 334, *Veazy v. Durham*, 354; *Veazy v. Durham*, 357; *Perkins v. Sykes*, 488; agreement as waiving right to object, *Casstevens v. Casstevens*, 572; sufficiency of objections and exceptions—to signing of judgment, *Burnsville v. Boone*, 577; *Scarboro v. Morgan*, 597; to findings of fact, *Burnsville v. Boone* 577; theory of trial in lower court, *Sutton v. Quinnerly*, 670; necessity

for case on appeal, *Reece v. Reece*, 321; powers of lower court after appeal, *Cameron v. Cameron*, 123; *Veazy v. Durham*, 357; *Elliott v. Swartz Industries*, 425; acquisition of jurisdiction by Supreme Court, *Veazy v. Durham*, 357; conclusiveness of record, *In re Will of Franks*, Appendix; briefs, *Williams v. Williams*, 33; scope and extent of review in general, *In re Crawford*, 91; presumptions and burden of showing error, *Nichols v. Trust Co.*, 158; *Whiteman v. Transportation Co.*, 701; *James v. Rogers*, 668; prejudicial and harmless error, *Hill v. R. R.*, 499; *Nichols v. Trust Co.*, 158; *Gray v. Power Co.*, 423; *Veazy v. Durham*, 357; *Combs v. Porter*, 585; *Goins v. McLoud*, 655; *Pegram-West v. Ins. Co.*, 277; *Whiteman v. Transportation Co.*, 701; review of exceptions to signing of judgment; *Culbreth v. Britt Corp.*, 76; *Terry v. Coal Co.*, 103; *Burnsville v. Boone*, 577; *Hill v. Britt*, 713; review of discretionary matters, *Light Co., v. Bowman* 332; *Veazy v. Durham*, 357; *Elliott v. Swartz Industries*, 425; review of findings of fact, *In re Cranford*, 91; *Burnsville v. Boone* 577; review of orders relating to pleadings, *Terry v. Coal Co.*, 103; *Parlier v. Drum*, 155; *Light Co. v. Bowman*, 332; *Scarboro v. Morgan*, 597; review of exception to ruling on motion to nonsuit, *Bruce v. Flying Service*, 182; constitutional question will not be decided in absence of necessity, *Horner v. Chamber of Commerce*, 440; petition to rehear, *In re Will of Franks* Appendix; mandate from U. S. Supreme Court, *Hill v. R. R.*, 499; law of the case, *Cherry v. Andrews*, 261; interpretation of decision of Supreme Court, *In re Adoption of Doe*, 1.

Appearance—*Wilmington v. Merrick*, 297; *Electric Membership Corp. v. Grannis Bros.*, 717.

Army—Admission of testimony that plaintiff was in army *held* not prejudicial, *Combs v. Porter*, 585.

Arrest and Bail—Authority of highway patrolman to make arrest, *Galloway v. Dept. of Motor Vehicles*, 447; bail bonds, *Hightower v. Thompson*, 491.

Arrest of Judgments—*S. v. Stone*, 324; *S. v. Miller*, 419; *S. v. Matthews*, 617.

Assault—Disciplinary punishment of prisoners as, *S. v. Carpenter*, 229; with automobile, *S. v. Ashley*, 508; assault with deadly weapon, *S. v. Matthews*, 617; competency of evidence, *S. v. Church*, 39; assault on female, *S. v. Church*, 39; *S. v. McIver*, 313.

Assignments—Rights of assignee of non-negotiable instrument, *Iselin & Co. v. Saunders*, 642.

Assignments of Error—Sole exception or assignment of error to signing of judgment presents only record for review, *Culbreth v. Britt Corp.*, 76; *Terry v. Coal Co.*, 103; *Burnsville v. Boone*, 577; *Scarboro v. Morgan*, 597; *Hill v. Britt*, 713.

Associations—*Warehouse Assn. v. Warehouse*, 142; *Lodge v. Benevolent Assn.*, 522.

Assumption of Risk—*Bruce v. Flying Service*, 181.

Attorney and Client—Argument of counsel, *Brown v. Vestal*, 56.

Automobiles—Child may sue parent's corporation for injury in automobile accident, *Foy v. Electric Co.*, 161; wife may sue husband for negligent driving, *King v. Gates*, 537; liability of bus companies to passengers injured in accidents, see Carriers; lessee of trucks for interstate commerce may not escape liability to public for negligent operation, *Motor Lines v. Johnson*, 367; registration of chattel mortgages and conditional sales on, *Montague Bros. v. Shepherd Co.*, 551; *Sheffield v. Walker*, 556; safety statutes and ordinances in general, *Cooley v. Baker* 533; *Whiteman v. Transportation Co.*, 701; distances between vehicles traveling in same direction, *Fawley v. Bobo*, 203; turning, *Cooley v. Baker*, 533; parking and stop-

ping, *Hollingsworth v. Grier*, 108; *Fawley v. Bobo*, 203; intersections, *Bobbitt v. Haynes*, 373; *Bailey v. Michael*, 404; speed, *Bobbitt v. Haynes*, 373; *Whiteman v. Transportation Co.*, 701; passing vehicles traveling in opposite direction, *Jenkins v. Coach Co.*, 208; nonsuit for contributory negligence, *Fawley v. Bobo*, 203; *Bobbitt v. Haynes*, 373; *Howard v. Bingham*, 420; *Bailey v. Michael*, 404; *Moore v. Boone*, 494; nonsuit on issue of *respondeat superior*, *Jones v. Tobacco Co.*, 336; homicide, *S. v. Swinney*, 506; *S. v. Ashley*, 508; reckless driving, *S. v. Merritt*, 59; *S. v. Perry*, 467; drunken driving, *S. v. Parsons*, 599.

Aviation—Liability of aviation corporation for death of passenger, *Bruce v. Flying Service*, 181.

Bail Bond—*Hightower v. Thompson*, 491.

Bailment—*Wellington-Sears Co. v. Finishing Works*, 96.

Banks—Safe Deposit Boxes, *Nichols v. Trust Co.*, 158; presentation of check with intent signature be taken as that of another *held* forgery, *Trust Co. v. Casualty Co.*, 510.

Bastards—Proceedings by mother to obtain custody, *In re Cranford*, 91; prosecution for willful failure to support, *S. v. Bowman*, 51; effect of legitimation, *In re Adoption of Doe*, 1; action of court in ordering defendant's witness arrested in presence of jury *held* error as disparaging witness, *S. v. McNeill*, 666.

Bills and Notes—Agreement to give or devise notes to maker's children, *Sinclair v. Travis*, 345; checks, *In re Will of Winborne*, 463; holder in due course, *Iselin & Co. v. Saunders*, 642.

Bodies—See Dead Bodies.

Bond—In caveat proceedings, *In re Will of Winborne*, 463; executors and administrators' bond, *In re Pitchi*, 485.

Boundaries—Calls to natural objects, *Cherry v. Andrews*, 261.

Briefs—Abandonment of exceptions by failure to discuss, *Williams v. Williams*, 33.

Brokers—Relationship, *Johnson v. Orrell*, 197; right to commissions, *Ibid.*

Burden of Proof—Resulting trust must be established by clear, strong and convincing proof, *Williams v. Williams*, 33; of proving mental incapacity to make will, *In re Will of York*, 70; *In re Will of Franks*, 252; of proving mental incapacity to execute deed, *Goins v. McLoud*, 655; that mortgage had been paid, *Combs v. Porter*, 585; defendant has burden on defenses of assumption of risk and contributory negligence, *Bruce v. Flying Service*, 181; in homicide prosecutions, *S. v. Chavis*, 307; burden of proving self-defense is on defendant, *S. v. Jernigan*, 338; *S. v. Pennell*, 651; charge *held* not erroneous as withdrawing question of innocence from jury, *S. v. Bridges*, 163; charge that reasonable doubt "grows out of evidence" *held* not prejudicial when charge construed contextually, *S. v. Bryant*, 106; instruction that if jury believed testimony of defendant beyond a reasonable doubt, to convict, *held* error, *S. v. Carpenter*, 229.

Burden of Showing Error—On appeal, *Nichols v. Trust Co.*, 158; *Whiteman v. Transportation Co.*, 701.

Burglary—Circumstantial evidence *held* insufficient in prosecution for, *S. v. Robertson* 211.

Burial—Widow is entitled to body of deceased husband for, *Lamm v. Shingleton*, 10.

Bus Companies—Liability to other motorists on highways, see Automobiles; liability to passengers, see Carriers.

Carriers—Right of railroad passenger to sue railroad and truck owner for injuries in accident, *Canestrino v. Powell*, 190; liability of lessee of truck in interstate commerce, *Motor Lines v. Johnson*, 376; liability of

carrier for injury to passenger, *Jenkins v. Coach Co.*, 208.

Cartways—*Raynor v. Ottoway*, 99.

Case on Appeal—Duty of appellant to make out and serve statement of case within time allowed, *S. v. Daniels*, 17; dismissal for failure to do so, *S. v. Medlin*, 162; *S. v. Jones*, 216; *S. v. Daniels*, 509; not necessary upon appeal from denial of motion relating solely to pleadings, *Reece v. Reece*, 321.

Casket—Action for breach of contract to furnish watertight vault, *Lamm v. Shingleton*, 10.

Caveat—See Wills.

Cemeteries—Rules *held* matters of defense in action against undertaker for breach of contract of burial, *Lamm v. Shingleton*, 10.

Certiorari—To preserve right to review will not be granted when case on appeal could have been served within time, *S. v. Daniels*, 17.

Chair—Liability of store proprietor for injury to customer from collapse of, *Schueler v. Good Friend Corp.*, 416.

Chamber of Commerce—Municipality may not contribute to ordinary expenses of, *Horner v. Chamber of Commerce*, 440.

Character Evidence—Defendant entitled to have evidence of good character considered as substantive proof, *S. v. Davis*, 664.

Charge—See Instructions

Charitable Hospitals—Conveyance of property to county, *Hospital v. Comrs. of Durham*, 604.

Chattel Mortgages and Conditional Sales—Registration, *Montague Brothers v. Shepherd*, 551; *Sheffield v. Walker*, 556; liability for deficiency after foreclosure, *Mitchell v. Battle*, 68.

Checks—Definition: check to be held by clerk is insufficient caveat bond, *In re Will of Winborne*, 463; presentation of, with intent that signature be taken as that of another *held* forgery, *Trust Co. v. Casualty Co.*, 510.

Chief of Police—Must be resident of municipality, *Barlow v. Benfield*, 663.

Children—See Infants.

Circumstantial Evidence—*Held* insufficient in prosecution for burglary, *S. v. Robertson*, 211.

Cities—See Municipal Corporations.

Clear, Strong and Convincing Proof—Resulting trust must be established by, *Williams v. Williams*, 33.

Clerks of Court—Appeals from clerk to Superior Court, see Courts; probate jurisdiction, *In re Pitchi*, 485; jurisdiction as juvenile court, *In re Cranford*, 91.

"Closed Shop"—Provision is void but does not effect other valid provision of employment contract, *In re Publishing Co.*, 395.

Coastal Highway—Preliminary survey *held* insufficient to constitute taking of land for toll road, *Penn v. Coastal Corp.*, 481.

Codification—Statute not brought forward in recodification repealed, *King v. Gates*, 537.

Commerce—Lessee of trucks for interstate commerce may not escape liability to public for negligent operation, *Motor Lines v. Johnson*, 367.

Common Carrier—See Carriers.

Common Knowledge—That snow and sleet melts faster in exposed places, *Browder v. Winston-Salem*, 400.

Common Law—Common law definition of forgery obtains here, *Trust Co. v. Casualty Co.*, 510; writ of error *coram nobis* obtains here, *S. v. Daniels*, 17; no common law right of action by children against stranger disrupting home. *Henson v. Thomas*, 173.

Compensation Act—See Master and Servant.

Complaint—See Pleadings.

Compulsory Reference—No appeal lies from order of, *Parker v. Helms*, 334; no appeal lies from discretionary refusal of, *Veazey v. Durham*, 354; *Veazey v. Durham*, 357.

Conclusion—Testimony *held* a conclusion rather than of an evidential fact, *S. v. Ashley*, 508.

Concurring Negligence—*Cooley v. Baker*, 533.

Condemnation—See Eminent Domain.

Conditional Sales—See Chattel Mortgages and Conditional Sales.

Confessions—*S. v. Brown*, 152; *S. v. Matthews*, 617.

Conflict of Laws—In action for injury sustained in another state *lex fori* governs procedure, *lex loci* governs substantive rights, *Jones v. Elevator Co.*, 285; *Caldwell v. Abernethy*, 692.

Consideration—Sufficient to support contract, *Jordan v. Maynard*, 101; *Sinclair v. Travis*, 345.

Conspiracy—Where murder is committed pursuant to conspiracy each conspirator is equally guilty, *S. v. Chavis*, 307.

Constitutional Law—Supreme Court may entertain application for permission to apply for writ of error *coram nobis*, *S. v. Daniels*, 17; petition for permission to apply for *coram nobis* denied for want of *prima facie* showing, *S. v. Daniels*, 341; proscription against establishment of courts by special act is not retroactive, *In re Wingler*, 560; constitutional requirements of warrant and indictment, see Indictment and Warrant; duty and power of courts to declare statute unconstitutional, *Bowie v. West Jefferson*, 408; police power, *McKinney v. Deneen*, 540; due process, *Townsend v. Coach Co.*, 81; *Bowie v. West Jefferson*, 408; *Wilmington v. Merrick*, 297; full faith and credit to foreign judgments, *Motor Lines v. Johnson*, 376; *Howland v. Stitzer*, 528; right to jury trial, *S. v. Speller*, 549.

Constructive Trusts—*Walker v. Walker*, 54.

Contempt of Court—*Cotton Mills v. Abrams*, 431.

Contentions—Immaterial error in stating will not be held prejudicial, *Pegram-West v. Ins. Co.*, 277.

Contingent Remainders—*Lide v. Mears*, 111; *Ellis v. Barnes*, 543; *Sutton v. Quinnerly*, 669.

Continuance—*Elliott v. Swartz Industries*, 425.

Contracts—Distinction between action in tort and on contract, *Lamm v. Shingleton*, 10; conditional sales contracts, see Chattel Mortgages and Conditional Sales; brokerage contracts, see Brokers; of bailment, see Bailments; for sale of realty, see Vendor and Purchaser; to devise, *Sinclair v. Travis*, 345; implied promise to pay for personal services rendered decedent, see Executors and Administrators; alteration of, *Johnson v. Orrell*, 197; acceptance and mutuality, *Iselin & Co. v. Saunders*, 642; Vague and indefinite contract, *Williamson v. Miller*, 722; consideration, *Jordan v. Maynard*, 101; contracts against public policy, *In re Publishing Co.*, 395; construction of contracts, *Williamson v. Miller*, 722; rights of third party beneficiary, *Canestrino v. Powell*, 190; *Jones v. Elevator Co.*, 285; pleadings, *McCampbell v. Building & Loan Assn.*, 647; damages for breach, *Lamm v. Shingleton*, 10.

Contribution—Among joint tort-feasors, see Torts.

Contributory Negligence—Demurrer on ground that complaint disclosed contributory negligence, *Hollingsworth v. Grier*, 108; need not be pleaded *eo nomine*, *Fawley v. Bobo*, 203; patron falling in theatre aisle *held* contributory negligence as matter of law, *Gordon v. Sprott*, 472; need not be sole cause of injury to bar recovery, *Fawley v. Bobo*, 203; *Gordon v. Sprott*, 472; *Moore v. Boone*, 494; plaintiff *held* contributorily negligent as matter of law in following vehicle on highway too closely, *Moore v. Boone*, 494; in hitting vehicle parked on highway without lights, *Hollingsworth v. Grier*, 108; nonsuit on ground of, *Bruce v. Flying Service*, 181; *Fawley v. Bobo*, 203; *Bobbitt v. Haynes*, 373; *Bailey v. Michael*, 404; *Howard v. Bingham*, 420.

Convenience of Witnesses—Change of venue for, *Nichols v. Goldston*, 581.

Convicts—Discipline and punishment, *S. v. Carpenter*, 229.

Coram Nobis—Writ of *coram nobis* obtains in this State, *S. v. Daniels*, 17; petition for permission to apply for denied for want of *prima facie* showing, *S. v. Daniels*, 341.

Corporations—Motion to set aside judgment for excusable neglect when process was served on statutory agent who did not give notice, *Townsend v. Coach Co.*, 81; error in designating partnership as corporation and service on individual partner as officer of corporation *held* not service on individual as partner and does not stop running of statute of limitations in favor of partnership where corporation as designated is materially different from firm name, *Electric Membership Corp. v. Grannis Bros.*, 716; authority of president, *Pegram-West v. Ins. Co.*, 277; dividends, *Steele v. Cotton Mills*, 636; implied corporate powers, *Pegram-West v. Ins. Co.*, 277; liability of new corporation for debts of old, *Canestrino v. Powell*, 190.

Corpse—See Dead Bodies.

Costs—After remand, taxing of costs will follow final judgment, *Barrier v. Troutman*, 47; provision that adverse party pay costs of transporting witnesses *held* not part of costs of action, *Nichols v. Goldston*, 581.

Counsel—See Attorney and Client.

Counties — Constitutional requirements and limitations on taxation, see Taxation: county hospitals, *Worley v. Johnston County*, 592; authority of county board of education to condemn site for school, *Board of Education v. Lewis* 661; law enforcement is governmental duty, *R. R. v. Mecklenburg County*, 148; county commissioners have power to appoint acting tax manager, *Roberts v. McDevitt*, 458; minutes and proceedings of boards, *Roberts v. McDevitt*, 458; county may accept deed for defeasable fee, *Hospital v. Comrs. of Durham*, 604.

County Courts—Superior Court on appeal may allow amendment within jurisdiction of county court, *S. v. Carpenter*, 229.

Course of Employment—*Pruett v. Bahnson Co.*, 711.

Courts—Jurisdiction of Supreme Court on appeal and review, see Appeal and Error; Juvenile Courts, see Clerks of Court; probate jurisdiction, *In re Pitchi*, 485; contempt of court, see Contempt of Court; function of courts in general, *Henson v. Thomas*, 173; *Veazy v. Durham*, 604; appeals from county Court, *Hospital v. Comrs. of Durham*, 604; *S. v. Carpenter* 229; appeals from clerk, *Bailey v. Davis*, 86; *Finance Co. v. Luck*, 110; jurisdiction after order of another Superior Court judge, *Veazy v. Durham*, 357; special act creating muncipal court, *In re Wingler*, 560; conflict of laws, *Jones v. Elevator Co.*, 285; *Caldwell v. Abernethy*, 692; may not enter order out of county and out of term, *Cameron v. Cameron*, 123; duty of Superior Court in reviewing exceptions to referee's report, *Macon v. Murray*, 61; decisions of Federal Courts controlling in construction of Federal Employers' Liability Act, *Hill v. R. R.*, 499; remark of court in questioning witness *held* not sufficiently prejudicial to warrant new trial, *S. v. Perry*, 467; action of court in ordering defendant's witness arrested in presence of jury *held* error as disparaging witness, *S. v. McNeill*, 666; where verdict is not responsive court may give additional instructions and have jury reconsider, *S. v. Matthews*, 617; no appeal lies from discretionary orders, *Veazey v. Durham*, 354; *Veazey v. Durham*, 357; *Elliott v. Swartz Industries*, 425; after appeal court is *functus officio*, *Cameron v. Cameron*, 123.

Covenants—Restrictive covenants in deeds, *Higdon v. Jaffa*, 242; *Bengel v. Barnes*, 667; to support grantor, *Casstevens v. Casstevens*, 572; covenants and warranty of title, *Culbreth v. Britt Corp.*, 76.

"Creditor Beneficiary"—*Canestrino v. Powell*, 190.

Criminal Conversations — Child may not maintain action against third person for, *Henson v. Thomas* 173.

Criminal Law—Indictment, see Indictment and Warrant; prosecutions for particular crimes, see Particular Titles of Crimes, parties and offenses, *S. v. Church*, 39; former jeopardy, *S. v. Bowman*, 51; *S. v. Chase*, 589; *S. v. Miller*, 419; burden of proof, *S. v. Cranford*, 211, evidence of guilt of other offenses, *S. v. Bryant*, 106; *S. v. Lowry*, 414; testimony of identity, *S. v. Church*, 39; confessions, *S. v. Brown*, 152; *S. v. Matthews*, 617; flight as implied admission, *S. v. Cranford*, 211; silence as implied admission, *S. v. Rich*, 696; photographs, *S. v. Chavis*, 307; character evidence, *S. v. Davis*, 664; credibility of accompolices, *S. v. Hale*, 412; re-opening case for additional evidence, *S. v. Perry*, 467; expression of opinion by court during trial, *S. v. Perry*, 467; *S. v. McNeill*, 666; nonsuit, *S. v. Church*, 39; circumstantial evidence, *S. v. Cranford*, 211; instructions on presumptions and burden of proof, *S. v. Bryant*, 106; *S. v. Bridges*, 163; *S. v. Carpenter*, 229; expression of opinion by court, *S. v. Merritt*, 59; *S. v. Rich*, 696; submission of guilt of less degree, *S. v. Church* 39; *S. v. Brown*, 152; charge on credibility of defendant, *S. v. Parsons*, 599; charge on credibility of accomplices, *S. v. Hale*, 412; form and insufficiency of issues, *S. v. Stone*, 324; requiring jury to re-deliberate, *S. v. Matthews*, 617; arrest of judgment, *S.v. Stone*, 324; *S. v. Matthews*, 617; writ of error *coram nobis*, *S. v. Daniels*, 17; *S. v. Daniels*, 341; case on appeal, *S. v. Daniels*, 17; *certiorari*, *S. v. Daniels*, 17; conclusiveness of record, *S. v. Chase*, 589; *S. v. Davis*, 664; exceptions, *S. v. Perry*, 467; prosecution of appeal and dismissal, *S. v. Medlin*, 162; *S. v. Jones*, 216; *S. v. Daniels*, 508; burden of showing error, *S. v. Vinson*, 603; harmless and prejudicial error, *S. v. Church*, 39; *S. v. Bridges*, 163; *S. v. Merritt*, 59; *S. v. Rich*, 696; *S. v. Perry*, 467; *S. v. Chase*, 589; review of exceptions to refusal to nonsuit, *S. v. Baker*, 136; application to apply for writ of error *coram nobis*, *S. v. Daniels*, 341.

Criminal Trespass—See Trespass.

Cross-Complaint—For contribution, *Canestrino v. Powell*, 190.

Culpable Negligence—*S. v. Williams*, 214; in operating automobile, *S. v. Swinney*, 506.

Customer—Liability for burning of customer's coat which caught fire as customer passed stove, *Clontz v. Purser*, 162.

Damages—For breach of contract, see Contracts; for diversion of surface waters, *Phillips v. Chesson*, 566; for breach of covenant to support grantor, *Casstevens v. Casstevens*, 572.

Dangerous Instrumentality—*Jones v. Elevator Co.*, 285.

Dangerous Substance—*Graham v. Gas Co.*, 680; *Gas Co. v. Montgomery Ward & Co.*, 270.

De Facto Officer—*Roberts v. McDevitt*, 458; *In re Wingler*, 560.

De Jure Officer—*In re Wingler*, 560.

Dead Bodies—Right to possession for burial, *Lamm v. Shingleton*, 10; contract to inter, *Ibid.*

Death—Wife's administrator may sue husband for wrongful death, *King v. Gates*, 537; under Colorado statute parent may sue for wrongful death of child, *Caldwell v. Abernethy*, 692; actions for wrongful death, *Davis v. Rhodes*, 71; *Colyar v. Motor Lines*, 318; *Bailey v. Michael*, 404.

Deadly Weapon—Assault with, see Assault; assault with automobile *S. v. Ashley*, 508; unlawful killing with, implies malice, *S. v. Chavis*, 307; no special intent required to constitute assault with, *S. v. Matthews*, 617.

Debt or Default of Another, Promise to Answer for—*Pegram-West v. Ins. Co.*, 277.

Decedents—Declarations by, against interest, *Towe v. Penland*, 504; testimony of transactions with, *Goins v. McLoud*, 655.

Declarations—By decedent against interest, *Towe v. Penland*, 504.

Declaratory Judgment Act—*Lide v. Mears*, 111; *Howard v. Stitzer*, 528.

Deeds—Introduction of deed in evidence admits execution but not its legal effect, *McDowell v. Staley*, 65; contracts to convey, see Vendor and Purchaser; ascertainment of boundaries, see Boundaries; extent of easement created by, question of law, *Veazey v. Durham*, 357; parol evidence incompetent to explain deed in absence of latent ambiguity, *McKay v. Cameron*, 658; parties, *Land Bank v. Bland*, 26; *Goins v. McLoud*, 655; registration raises presumption of due execution, *Bank v. Sherrill*, 731; failure to register deed, other than deed, of gift, does not affect validity, *Walker v. Walker*, 54; construction of deeds, *Pittman v. Stanley*, 327; *Ellis v. Barnes*, 543; restrictive covenants, *Higdon v. Jaffa*, 242; *Bengel v. Barnes*, 667; covenant to support grantor, *Casstevens v. Casstevens*, 572; warranty of title, *Culbreth v. Britt Corp.*, 76; timber deed, *McKay v. Cameron*, 658.

Deeds of Trust—See Mortgages.

Default Judgments—See Judgments.

Defeasible Fee—*Lide v. Mears*, 111; *House v. House*, 218; *Ellis v. Barnes*, 543.

Deliberation—*S. v. Chavis*, 307.

Demurrer—See Pleadings; on ground that complaint disclosed contributory negligence, *Hollingsworth v. Grier*, 108.

Dermatitis—As occupational disease, *Henry v. Leather Co.*, 477.

Diagram—Competency in evidence, *Cotton Mills v. Abrams*, 431.

Directed Verdict—Correct form of peremptory instruction, *Trust Co. v. Casualty Co.*, 510.

Discretion of Court—No appeal lies from discretionary orders, *Veazey v. Durham*, 354; *Veazey v. Durham*, 357; *Elliott v. Swartz Industries*, 425.

Discrimination—In excluding negroes from jury, *S. v. Speller*, 549.

Dismissal—Of appeal for failure to prosecute same, *S. v. Medlin*, 162; *S. v. Jones*, 216; *S. v. Daniels*, 509.

Disposition—Devise with power of, *Langston v. Barfield*, 594.

Diversion of Surface Waters—*Phillips v. Chesson*, 566.

Dividends—*Mandamus* to compel declaration of, *Steele v. Cotton Mills*, 636.

Divorce and Alimony—Alimony *pendente lite*, *Cameron v. Cameron*, 123; *Bumgarner v. Bumgarner*, 600; alimony without divorce, *Reece v. Reece*, 321; modification of decrees for alimony, *Howland v. Stitzer*, 528; awarding custody of children, *Cameron v. Cameron*, 123; *Reece v. Reece*, 321.

Doctrine of Ademption—*Green v. Green*, 707.

Doctrine of Insulating Negligence—Matter having been covered in charge on proximate cause, failure to give specific instructions on, *held* not error, *Whiteman v. Transportation Co.*, 701.

Domicile—*Sheffield v. Walker*, 556.

Dominant Highways — *Bobbitt v. Haynes*, 373; *Bailey v. Michael*, 404; *Howard v. Bingham*, 420.

Drainage Districts—*In re Canal Co.*, 131.

Drowning—Manslaughter in drowning bather, *S. v. Williams*, 214.

Drunken Driving—*S. v. Parsons*, 599.

Due Execution—Recording of deed of trust raises presumption of, *Bank v. Sherrill*, 731.

Due Process of Law—Refusal to set aside judgment for excusable neglect when defendant has had no notice would be denial of, *Townsend v. Coach Co.*, 81; to permit tax lien foreclosure to stand in absence of notice and hearing would be deprivation of, *Wilmington v. Merrick*, 297; evaluation of property for taxation without notice and hearing unconstitutional, *Bowie v. West Jefferson*, 408.

Dying Declarations—*S. v. Rich*, 696.

Dynamite—Killing fish with, *S. v. Miller*, 419.

Easement—To be allowed to drain into existing canal, *In re Canal Co.*, 131; extent of easement, *Veazy v. Durham*, 357.

Ejectment—Summary ejectment, *Ford v. Moulding Co.*, 105; *Prentzas v. Morrow*, 330; *McDowell v. Staley*, 65.

Elections—*Roberts v. McDevitt*, 458; *Barlow v. Benfield*, 663.

Elevators—Action for injuries from defect, *Jones v. Elevator Co.*, 285.

Eminent Domain—Where condemnation of memorial park is threatened, trustee may transfer to government upon its agreement to maintain park, *Hospital v. Cone*, 292; permanent damages not recoverable for wrongful diversion of surface waters by private owner, *Phillips v. Chesson*, 566; authority of county board of education to condemn site for school, *Board of Education v. Lewis*, 661; necessity for compensation, *McKinney v. Deneen*, 540; acts constituting "taking", *Penn v. Coastal Corp.*, 481; *McKinney v. Deneen*, 540; proceedings to assess compensation, *Penn v. Coastal Corp.*, 481.

Employer and Employee— See Master and Servant.

Employers' Liability Act—*Hill v. R. R.*, 499.

Employment Security Com.—*Employment Security Com. v. Jarrell*, 381.

Entireties—Husband is entitled to usufruct of lands held by entireties, *Williams v. Williams* 33.

Equity—Jurisdiction to order sale of interest of infants in lands, *Lide v. Mears*, 111; may modify trust to accomplish objective, *Hospital v. Cone*, 292; *Hospital v. Comrs. of Durham*, 604; will not relieve against restricted covenants when there has been no violation within sub-division, *Higdon v. Jaffa*, 242; will not restrain violation of residential restrictions when character of development has changed, *Bengel v. Barnes*, 667.

Estates by Entireties—Husband is entitled to usufruct of lands *held* by entireties, *Williams v. Williams*, 33.

Estoppel—Waiver, see Waiver; of married women, *Bank v. Sherrill*, 731.

Evaluation—Of property for taxation without notice and hearing unconstitutional, *Bowie v. West Jefferson*, 408.

Evidence—In particular actions, see Particular Titles of Actions; in criminal prosecutions, see Criminal Law and Particular Titles of Crimes; sufficiency of evidence and nonsuit see Nonsuit; respective province of court and jury in regard to evidence, *Graham v. Gas Co.*, 680; judicial notice of laws of other states, *Caldwell v. Abernethy*, 692; *prima facie* proof, *Cameron v. Cameron*, 123; admissions in pleadings, *McDowell v. Staley*, 65, *Browder v. Winston-Salem*, 400; photographs and maps, *Cotton Mills v. Abrams*, 431; transactions with decedent, *Goins v. McLoud*, 655; best and secondary evidence, *Roberts v. McDevitt*, 458; parol evidence affecting writings, *McKay v. Cameron*, 658; hearsay evidence, *Towe v. Penland*, 504; declaration of decedent against interest, *Towe v. Penland*, 504; invasion of province of jury by opinion evidence, *In re Will of York*, 70; testimony *held* a conclusion rather than of an evidential fact, *S. v. Ashley*, 508; physical facts, *Bailey v. Michael*, 404; parol evidence incompetent under pro-

visions of Statute of Frauds, see Frauds, Statute of; court has power to permit State to offer additional evidence after it had rested, *S. v. Perry*, 467; expression of opinion on evidence in charge, *S. v. Merritt*, 59; *S. v. Rich*, 696; harmless and prejudicial error in admission and exclusion of, *S. v. Merritt*, 59; *S. v. Rich*, 696.

Exceptions—To expression of opinion by court may be taken after verdict, *S. v. Perry*, 467; sole exception or assignment of error to signing of judgment presents only record for review, *Culbreth v. Britt Corp.*, 76; *Terry v. Coal Co.*, 103; *Burnsville v. Boone*, 577; *Scarboro v. Morgan*, 597; *Hill v. Britt*, 713.

Exchanges—Tobacco warehousemen's association, *Warehouse Assn. v. Warehouse*, 142.

Execution—Homestead exemption, see Homestead; prior sale of personalty, *Land Bank v. Bland*, 26; limitation of time for sale, *Land Bank v. Bland*, 26; recording of deed of trust raises presumption of due execution, *Bank v. Sherrill*, 731.

Executors and Administrators—Right to change of venue may not be invoked by other party to action, *Herring v. Coach Co.*, 430; wife's administrator may sue husband for wrongful death, *King v. Gates*, 537; right to exercise power of sale, *Combs v. Porter*, 585; jurisdiction to appoint, *In re Pitchi*, 485; removal and revocation of letters, *In re Pitchi*, 485; claims for personal services rendered decedent, *Lindley v. Frazier*, 44.

Explosives—Killing fish with, *S. v. Miller*, 419.

Expression of Opinion—On evidence in charge, *S. v. Merritt*, 59; *S. v. Rich*, 696; action of court in ordering defendant's witness arrested in presence of jury *held* error as disparaging witness, *S. v. McNeill*, 666; remark of court in questioning witness *held* not sufficiently prejudicial to warrant new trial, *S. v. Perry*, 467.

Extortion—*Hightower v. Thompson*, 491.

Facts, Findings of—See Findings of Fact.

"Fair Market Value"—Is not measure of damages for diversion of surface waters by private owner, *Phillips v. Chesson*, 566.

False Imprisonment—Validity of warrant in malicious prosecution, *Carson v. Doggett*, 629.

Federal Courts—Decisions of controlling in construction of Federal Employers' Liability Act, *Hill v. R. R.*, 499.

Federal Employers' Liability Act—*Hill v. R. R.*, 499.

Federal Scenic Highway — Where condemnation of memorial park is threatened, trustee may transfer to government upon its agreement to maintain park, *Hospital v. Cone*, 292.

Fee Tail Special—*Pittman v. Stanley*, 327.

Felony—Murder committed in perpetration of, *S. v. Streeton*, 301; *S. v. Chavis*, 307.

Fence—Is part of realty, *S. v. Baker*, 136.

"Filed"—Definition of filing of a pleading, *Bailey v. Davis*, 86.

Filling Station—Liability for burning of customer's coat which caught fire as customer passed stove, *Clontz v. Purser*, 162; contract between distributor and retailer attempting to exclude competitors' products, *Williamson v. Miller*, 722.

Final judgments— *Veazey v. Durham*, 357.

Findings of Fact—Finding based on conclusion of law not binding, *In re Cranford*, 91; of referee are not competent in trial upon exceptions, *Cherry v. Andrews*, 261; of Employment Security Commission conclusive, *Employment Security Com. v. Jarrell*, 381; of Industrial Commission are conclusive, *Henry v. Leather Co.*, 477; sufficiency of objec-

tions and exceptions to findings, *Burnsville v. Boone*, 577.
Fire—Liability for burning of customer's coat which caught fire as customer passed stove, *Clontz v. Purser*, 162.
Fire Insurance—See Insurance.
Firearms—Robbery with, *S. v. Chase*, 589.
Fishing—Killing fish with dynamite, *S. v. Miller*, 419.
Flight—Alone insufficient proof of guilt, *S. v. Robertson*. 211.
Flying—See Aviation.
Foreclosure—Of chattel mortgages, see Chattel mortgages and Conditional Sales; of tax lien, *Wilmington v. Merrick*, 297.
Forgery—*Trust Co. v. Casualty Co.*, 510.
Former Jeopardy—*S. v. Bowman*, 51; *S. v. Miller*, 419; *S. v. Chase*, 589.
Fraud—Exercise of legal right cannot be basis of fraud, *Walker v. Walker*, 54; time cause of action accrues, *Lee v. Rhodes*, 602.
Frauds, Statute of—Promise to answer for debt of another, *Pegram-West v. Ins. Co.*, 277; contracts relating to realty, *Walker v. Walker*, 54; *McCampbell v. Building & Loan Assn.*, 647; *Carpenter v. Yancey*, 160.
Fuel Gas—*Graham v. Gas Co.*, 680.
Full Faith and Credit—*Motor Lines v. Johnson*, 367; *Howland v. Stitzer*, 528.
Funeral—Contractual duties of undertaker in conducting, *Lamm v. Shingleton*, 10.
Gaming—*S. v. Bryant*, 106.
Gas—Liability for selling defective heater, *Gas Co. v. Montgomery Ward & Co.*, 270; liability of dealer in delivery of gas, *Graham v. Gas Co.*, 680.
General Appearance—*Electric Membership Corp. v. Grannis Bros.*, 716.
"General Purpose"—Within meaning of Art. V. sec. 6, N. C. Constitution, *R. R. v. Mecklenburg County*, 148.
Gifts—*Inter vivos*, *Sinclair v. Travis*, 345.
Habeas Corpus—To obtain custody of minor children, *In re Cranford*, 91.
Habendum—*Ellis v. Barnes*, 543.
Harmless and Prejudicial Error—Error must be prejudicial to entitle appellant to new trial, *Nichols v. Trust Co.*, 158; *Whiteman v. Transportation Co.*, 701; where sentences are concurrent error must relate to all counts, *S. v. Merritt*, 59; cured by verdict, *Nichols v. Trust Co.*, 158; *Veazey v. Durham*, 357; *Gray v. Power Co.*, 423; *Combs v. Porter*, 585; error not cured by verdict when error affects jury's answer to other issue, *Goins v. McLoud*, 655; in submitting question of guilt of less degree of offense, *S. v. Chase*, 589; in instructions, *S. v. Church*, 39; *Nichols v. Trust Co.*, 158; *S. v. Bridges*, 163; *Pegram-West v. Ins. Co.*, 277; *Whiteman v. Transportation Co.*, 701; in admission and exclusion of evidence, *S. v. Merritt*, 59; *Combs v. Porter*, 585; *S. v. Rich*, 696; in expressing opinion on credibility of witness, *S. v. Perry*, 467.
Hearsay Evidence—*Towe v. Penland*, 504.
"Heirs"—Construed as children, *Lide v. Mears*, 111; *House v. House*, 218; *Ellis v. Barnes*, 543; *held* used in technical sense, *Pittman v. Stanley*, 327.
Highway Com.—Disciplinary punishment of prisoners as assault, *S. v. Carpenter*, 229; may promulgate special speed restrictions, *Whiteman v. Transportation Co.*, 701.
Highway Patrolmen—Right to make arrest, *Galloway v. Dept. of Motor Vehicles*, 447.
Highways—Where condemnation of memorial park for scenic highway is threatened, trustee may transfer to government upon its agreement to maintain park, *Hospital v. Cone*, 292; preliminary survey *held* insufficient to constitute taking of land for coastal toll road, *Penn v. Coastal Corp.*, 481; authority of patrolmen to arrest and use airplane for reconizance, *Galloway v.*

Dept. of Motor Vehicles, 447; neighborhood public roads, *Raynor v. Ottoway*, 99; law of the road, see Automobiles.

Homestead—*Land Bank v. Bland*, 26.

Homicide—statute merely divides common law murder into two degrees, *S. v. Streeton*, 301; conspirator guilty as principal, *S. v. Chavis*, 307; murder in first degree, *S. v. Heller*, 67; *S. v. Chavis*, 307; premeditation and deliberation, *S. v. Chavis*, 307; murder committed in perpetration of felony, *S. v. Streeton*, 301; *S. v. Chavis*, 307; murder in second degree, *S. v. Chavis*, 307; manslaughter, *S. v. Williams*, 214; *S. v. Swinney*, 506; self-defense, *S. v. Pennell*, 651; presumptions and burden of proof, *S. v. Chavis*, 307; *S. v. Jernigan*, 338; *S. v. Pennell*, 651; dying declarations, *S. v. Rich*, 696; evidence of premeditation and deliberation, *S. v. Chavis*, 307; sufficiency of evidence and nonsuit, *S. v. Williams*, 214; *S. v. Chavis*, 307; *S. v. Jernigan*, 338; instructions, *S. v. Bridges*, 163; *S. v. Heller*, 67; *S. v. Brown*, 152; *S. v. Rich*, 696.

Hospitals—*Worley v. Johnson*, 592; *Hospital v. Comrs. of Durham*, 604.

Hotel—Liability for fall of patron, *Coston v. Hotel*, 546.

Hunting and Fishing—Prosecution for dynamiting of fish, *S. v. Miller*, 419.

Husband and Wife—Divorce, see Divorce; widow is entitled to body of deceased husband for burial, *Lamm v. Shingleton*, 10; competency of wife to testify as to nonaccess of husband upon question of paternity, *S. v. Bowman*, 51; child may not maintain action against third person for criminal conversation, *Henson v. Thomas*, 173; wife's right to maintain action in tort, *King v. Gates*, 537; contracts and conveyances between husband and wife, *Williams v. Williams*, 33; usufruct of lands held by entireties, *Williams v. Williams*, 33; abandonment, *S. v. Stone*, 324.

Identity—Testimony as to, *S. v. Church*, 39.

Illigitimate Children—See Bastards.

Implied Authority—Of president of corporation, *Pegram-West v. Ins. Co.*, 277.

Indemnity—Rights of defendants *inter se* could have been litigated in action in the Federal court and Federal Judgment bars action in State court on indemnity agreement, *Motor Lines v. Johnson*, 367; loss covered, *Trust Co. v. Casualty* Co., 510.

Indictment and Warrant—Charge of crime, *S. v. Miller*, 419; identification of person accused, *Carson v. Doggett*, 629; amendment, *S. v. Carpenter*, 229; *S. v. Stone*, 324; *Carson v. Doggett*, 629; variance, *S. v. Baker*, 136.

Infants—Prosecutions for willful failure to support illegitimate child, see Bastards; adoption of children, see Adoption; relationship of parent and child and respective rights and duties, see Parent and Child; awarding custody of in divorce action, see Divorce; proceedings to obtain custody of minor child, *In re Cranford*, 91; abandonment of, by parent, *In re Adoption of Doe*, 1; *In re Cranford*, 91; *S. v. Stone*, 324; sale of property for reinvestment, *Lide v. Mears*, 111.

Injunctions—Contempt for willful disobedience, *Cotton Mills v. Abrams*, 431; equity will not restrain violation of residential restrictions when character of development has changed, *Bengal v. Barnes*, 667; irreparable injury, *Barrier v. Troutman*, 47; continuance of temporary order, *Elliott v. Swartz Industries*, 425; enjoining nuisance, *Barrier v. Troutman*, 47.

Insanity—Mental capacity to make will, *In re Will of York*, 70; *In re Will of Franks* 252; mental capacity to execute deed, *Goins v. McLoud*, 655.

Instructions—Duty to explain law and apply evidence, *Brown v. Vestal*, 56; expression of opinion on evi-

dence in, *S. v. Merritt*, 59; *S. v. Rich*, 696; on scrutiny to be given testimony of accomplice, *S. v. Hale*, 412; on scrutiny to be given testimony of defendant, *S. v. Parsons*, 599; on burden of proof, *S. v. Carpenter*, 229; charge of reasonable doubt "grows out of evidence" *held* not prejudicial when charge construed contextually, *S. v. Bryant*, 106; where verdict is not responsive, court may give additional instructions and have jury reconsider, *S. v. Matthews*, 617; in absence of supporting evidence, court is not required to submit question of guilt of less degree of crime, *S. v. Church*, 39; *S. v. Brown*, 152; *S. v. Rich*, 696; in this action for malicious prosecution *held* insufficient, *Carson v. Doggett*, 629; matter having been covered in charge on proximate cause, failure to give specific instructions on doctrine of insulating negligence *held* not error, *Whiteman v. Transportation Co.*, 701; in caveat proceedings, *In re Will of Franks*, 252; in homicide prosecutions, *S. v. Heller*, 67; *S. v. Bridges*, 163; in prosecutions for robbery, *S. v. Chase*, 589; *held* to properly call to jury's attention the right to recommend life imprisonment upon conviction of rape, *S. v. Speller*, 549; harmless and prejudicial error in, *S. v. Church*, 39; *Nichols v. Trust Co.*, 158; *S. v. Bridges*, 163; *Pegram-West v. Ins. Co.*, 277; *Whiteman v. Transportation Co.*, 701.

Insulating Negligence—*Gas Co. v. Montgomery Ward & Co.*, 270; *Cooley v. Baker*, 533; matter having been covered in charge on proximate cause, failure to give specific instructions on doctrine of insulating negligence *held* not error, *Whiteman v. Transportation Co.*, 701.

Insurance—Rights of husband and wife as to proceeds of policy on life of wife's father, *Williams v. Williams*, 33; Workmen's Compensation insurance, *Jones v. Elevator Co.*, 285; indemnity bond against loss by forgery, *Trust Co. v. Casualty Co.*, 510; fire insurance, *Meekins v. Ins. Co.*, 452; liability and collision insurance, *Jordon v. Maynard*, 101.

Intent—Felonious intent is element of robbery, *S. v. Chase*, 589; no special intent required to constitute assault with deadly weapon, *S. v. Matthews*, 617.

Interlocutory Orders—*Veazey v. Durham*, 357.

Intersections—*Bobbitt v. Haynes*, 373; *Bailey v. Michael*, 404; *Howard v. Bingham*, 420.

Interstate Commerce—Lessee of trucks for, may not escape liability to public for negligent operation, *Motor Lines v. Johnson*, 367.

Intervening Negligence—*Gas Co. v. Montgomery Ward & Co.*, 270; *Cooley v. Baker*, 533; *Whiteman v. Transportation Co.*, 701.

Intoxicating Liquor — Presumptions and burden of proof, *S. v. Merritt*, 59; sufficiency of evidence and nonsuit, *S. v. Merritt*, 59; *S. v. Perry*, 467.

Intoxication—*S. v. Parsons*, 599.

Invitee—*Coston v. Hotel*, 546.

Involuntary Manslaughter—Evidence *held* not to warrant submission of guilt of, *S. v. Rich*, 696.

Irrelevant and Redundant Matters—Motions to strike, *Light Co. v. Bowman*, 332.

"Irreparable Injury"—*Barrier v. Troutman*, 47.

Issues—Sufficiency of, *Cherry v. Andrews*, 261; refusal to submit issue tendered *held* not error, *Williams v. Williams*, 33; *Whiteman v. Transportation Co.*, 701; in criminal prosecutions, *S. v. Stone*, 324.

Jeopardy—*S. v. Bowman*, 51.

Joint Tort-Feasors—Rights of defendants *inter se* could have been litigated in action in the Federal court and Federal judgment bars action in State court on indemnity agreement, *Motor Lines v. Johnson*, 367; where plaintiff makes no demand against party joined by original de-

fendant nonsuit does not preclude subsequent action by injured party against person so joined, *Powell v. Ingram*, 427; parties separately polluting stream may be joined in one action, *Stowe v. Gastonia*, 157; *McKinney v. Deneen*, 540; one tort-feasor cannot complain of nonsuit as to plaintiff's cause against codefendant, *Whiteman v. Transportation Co.*, 701; contribution, *Canestrino v. Powell*, 190; *Jones v. Elevator Co.*, 285.

Joint Venture—Father, son and daughter-in-law *held* engaged in joint venture precluding her recovery for personal services rendered father-in-law, *Lindley v. Frazier*, 44.

Judges—May not enter order out of county and out of term, *Cameron v. Cameron*, 123; discretionary power of court during trial, *Pegram-West v. Ins. Co.*, 277; rule that one Superior Court Judge may not review order of another, *Veazey v. Durham*, 357; mayor as *de facto* judge of municipal court, *In re Wingler*, 560; special and emergency judges, *In re Cranford*, 91; conduct of trial and instructions, see Trial.

Judgments—Execution, see Execution; on the pleadings, see Pleadings; motion in arrest of, *S. v. Stone*, 324; *S. v. Miller*, 419; nonsuit on offense charged followed by submission of question of lesser degree will not support arrest of judgment upon conviction of less degree, *S. v. Matthews*, 617; consent judgments, *Nichols v. Goldston*, 581; default judgments, *Bailey v. Davis*, 86; final and interlocutory judgments, *Veazey v. Durham*, 357; time and place of rendition, *Cameron v. Cameron*, 123; life of lien, *Land Bank v. Bland*, 26; setting aside, *Townsend v. Coach Co.*, 81; *Bailey v. Davis*, 86; *Wilmington v. Merrick*, 297; *Howland v. Stitzer*, 528; parties concluded, *Culbreth v. Britt Corp.*, 76; *Canestrino v. Powell*, 190; matters concluded, *Neill v. Bach*, 391; judgments as bar to subsequent action, *Powell v. Ingram*, 427; *Sutton v. Quinnerly*, 670; *Motor Lines v. Johnson*, 367; full faith and credit to foreign, *Motor Lines v. Johnson*, 367; judgments appealable, *Parker v. Helms*, 334; *Veazey v. Durham*, 354; *Veazey v. Durham*, 357; *Perkins v. Sykes*, 488; sole exception or assignment of error to signing of judgment presents only record for review, *Culbreth v. Britt Corp.*, 76; *Terry v. Coal Co.*, 103; *Burnsville v. Boone* 577; *Scarboro v. Morgan*, 597; *Hill v. Britt*, 713.

Judicial Notice—Supreme Court will take judicial notice that solicitor must be out of office great part of time, *S. v. Daniels*, 17; that snow and sleet melts faster in exposed places is common knowledge, *Browder v. Winston-Salem*, 400; of laws of sister state, *Caldwell v. Abernethey*, 692.

Judicial Sales—Execution sales, see Execution.

Jury—Invasion of province of by witness, *In re Will of York*, 70; where verdict is not responsive court may give additional instructions and have jury reconsider, *S. v. Matthews*, 617; charge *held* to properly call to jury's attention right to recommend life imprisonment upon conviction of rape, *S. v. Speller*, 549; challenge to array for exclusion of Negroes, *S. v. Speller*, 549.

Justices of the Peace—Summary ejectment, *Ford v. Moulding Co.*, 105; *Prentzas v. Morrow*, 330.

Juvenile Courts—See Clerks of Court.

Kidnapping—Murder committed in perpetration of, *S. v. Streeton*, 301.

Labor Unions—"Closed shop" provision is void but does not effect other valid provision of employment contract, *In re Publishing Co.*, 395; contempt in wilfully violating order enjoining picketing, *Cotton Mills v. Abrams*, 431.

Laborers' and Materialmen's Liens—*Supply Co. v. Rivenbark*, 213.

Landlord and Tenant—Summary ejectment, *Ford v. Moulding Co.*, 105; *Prentzas v. Morrow*, 330; lessor is not partner in business operated at leased premises, *Perkins v. Langdon*, 386; sale of reversion, *Perkins v. Langdon*, 386.

Law of the Case—*Cherry v. Andrews*, 261.

Leases—See Landlord and Tenant.

Less Degree of Crime—In absence of supporting evidence, court is not required to submit question of guilt of, *S. v. Church*, 39; *S. v. Brown*, 152; *S. v. Rich*, 696; error in submitting question of not prejudicial, *S. v. Chase*, 589.

Lex Loci—Determines substantive rights of parties, *Jones v. Elevator Co.*, 285; *Caldwell v. Abernethy*, 692.

Liability Insurance—Insurer is not proper party in action by injured third person against insured, *Jordan v. Maynard*, 101; all reference to liability insurance is prejudicial, *Jordan v. Maynard*, 101.

Licensee—*Coston v. Hotel*, 546.

Liens—Drainage liens, *In re Canal Co.*, 131; tax liens see Taxation; laborers' and materialmen's liens, *Supply Co. v. Rivenbark*, 213; judgment liens see Judgments.

Life Estates—Renunciation of life estate accelerates vesting of remainder but not time of calling of roll to ascertain members of class, *Neill v. Bach*, 391.

Life Imprisonment—Charge *held* to properly call to jury's attention right to recommend upon conviction of rape, *S. v. Speller*, 549.

Lights—Contributory negligence in hitting vehicle parked on highway without, *Hollingsworth v. Grier*, 108.

Limitation of Actions—Time within which action for wrongful death must be instituted, see Death; requirement that action on fire policy be instituted within 12 months *held* waived, *Meekins v. Ins. Co.*, 452; time within which caveat must be instituted, *In re Will of Winborne*, 463; accrual of cause for fraud, *Lee v. Rhodes*, 602; institution of action, *Electric Membership Corp. v. Grannis Bros.*, 716.

Lotteries—*S. v. Bryant*, 106.

Madison County—Election of tax collector, *Roberts v. McDevitt*, 458.

Malice—Unlawful killing with deadly weapon implies, *S. v. Chavis*, 307.

Malicious Injury—To personalty, prosecution for, *S. v. Baker*, 136.

Malicious Prosecution—*Carson v. Doggett*, 629.

Mandamus—*Steele v. Cotton Mills*, 636.

Manslaughter—See Homicide.

Married Women—See Husband and Wife; estoppel of, *Bank v. Sherrill*, 731.

Masons—*Lodge v. Benevolent Asso.*, 522.

Master and Servant—Contract of employment, *In re Publishing Co.*, 395; employer's liability for employee's negligence, *Graham v. Gas Co.*, 680; *Jones v. Tobacco Co.*, 336; *Bruce v. Flying Service*, 181; contempt in violating order enjoining picketing, *Cotton Mills v. Abrams*, 431; Federal Employers' Liability Act, *Hill v. R. R.*, 499; N. C. Compensation Act, *Henry v. Leather Co.*, 477; *Galloway v. Dept. of Motor Vehicles*, 447; *Pruett V. Bahnson*, 711; *Jones v. Elevator Co.*, 285; N. C. Unemployment Compensation Act, *Employment Security Commission v. Whitehurst*, 497; *Employment Security Com. v. Jarrell*, 381.

Materialmen's Liens—*Supply Co. v. Rivenbark*, 213.

Memorial Parks—Where condemnation of is threatened, trustee may transfer to government upon its agreement to maintain park, *Hospital v. Cone*, 292.

Mental Anguish—As element of damage for breach of contract, *Lamm v. Shingleton*, 10.

Mental Capacity—To make will, *In re Will of York*, 70; *In re Will of*

Franks, 252; to execute deed, *Goins v. McLoud*, 655.

Mica—Sediment resulting from mining of, *McKinney v. Deneen*, 540.

Mines and Minerals—Liability of mica company for sediment deposited on lands of lower proprietor, *McKinney v. Deneen*, 540.

Misdemeanor—Assault on female is, *S. v. Church*, 39.

Misjoinder—Demurrer for, see Pleadings.

Mortgages—Mortgagee's contract with purchaser of equity to complete house on property, *McCampbell v. Building & Loan Asso.*, 647; ademption of specific legacy of mortgage notes, *Green v. Green*, 707; presumption of due execution from recording, *Bank v. Sherrill*, 731; lien of purchase money mortgage, *Supply Co. v. Rivenbark*, 213; attack of foreclosure, *Combs v. Porter*, 585.

Morticians—Contractual duties in conducting funeral, *Lamm v. Shingleton*, 10.

Motions—To nonsuit, see Nonsuit; for judgment on the pleadings, see Pleadings; in arrest of judgment, *S. v. Stone*, 324; *S. v. Miller*, 419; for continuance, *Elliott v. Swartz Industries*, 425; to strike, review of orders on, *Terry v. Coal Co.*, 103; *Parlier v. Drum*, 155; *Light Co., v. Bowman*, 332; *Scarboro v. Morgan*, 597; upon appeal from denial of motion relating solely to pleadings no service or settlement of case on appeal is required, *Reece v. Reece*, 321.

Moving Picture Theatres—Patron falling in aisle *held* contributorily negligent as matter of law, *Gordon v. Sprott*, 472.

Municipal Corporations — Drainage districts, *In re Canal Co.*, 131; extent of easement created by deed for discharge of sewage on land, *Veazey v. Durham*, 357; mayor's right to act as special court, *In re Wingler*, 560; powers, *Horner v. Chamber of Commerce*, 440; police chief must be resident, *Barlow v. Benfield*, 663; liability for injuries on streets and sidewalks, *Browder v. Winston-Salem*, 400; injuries from operation of sewerage system, *Stowe v. Gastonia*, 157; city may not appropriate tax money to chamber of commerce, *Horner v. Chamber of Commerce*, 440.

Murder—See Homicide.

Natural Objects—Call in deed to, *Cherry v. Andrews*, 261.

Negligence—Distinction between action in negligence and on contract, *Lamm v. Shingleton*, 10; actions for wrongful death, see Death; in operation of automobiles, see Automobiles; wife may sue husband for negligent driving, *King v. Gates*, 537; child may sue parent's corporation for injury in automobile accident, *Foy v. Electric Co.*, 161; in action for injury sustained in another State *lex fori* governs procedure, *lex loci* governs substantive rights, *Jones v. Elevator Co.*, 285; *Caldwell v. Abernethy*, 692; liability of master for servant's negligence in general, *Graham v. Gas Co.*, 680; employer and insurance carrier not necessary parties in action by employee against third person tort-feasor, *Jones v. Elevator Co.*, 285; evidence *held* sufficient for jury in action of Federal Employers' Liability Act, *Hill v. R. R.*, 499; in operation of airplanes, *Bruce v. Flying Service*, 181; in delivery of gas to customer, *Graham v. Gas Co.*, 680; imputed negligence, *Townsend v. Coach Co.*, 81; dangerous substances and machinery, *Gas Co. v. Montgomery Ward & Co.*, 270; *Jones v. Elevator Co.*, 285; *Graham v. Gas Co.*, 680; liability for snow on sidewalk, *Browder v. Winston-Salem*, 400; liability to invitees, *Foy v. Electric Co.*, 161; *Schueler v. Good Friend Corp.*, 416; *Gordon v. Sprott*, 472; *Coston v. Hotel Co.*, 546; intervening negligence, *Gas Co. v. Montgomery Ward & Co.*, 270; *Whiteman v. Transportation Co.*, 701; contributory negligence, *Fawley v.*

Bobo, 203; *Gordon v. Sprott*, 472; *Moore v. Boone*, 494; pleadings and parties, *Jones v. Elevator Co.*, 285; *Davis v. Rhodes*, 71; *Hollingsworth v. Grier*, 108; *Fawley v. Bobo*, 203; burden of proving assumption of risk, *Bruce v. Flying Service*, 181; *res ipsa loquitur*, *Schueler v. Good Friend Corp.*, 416; nonsuit for contributory negligence, *Bruce v. Flying Service*, 181; *Bailey v. Michael*, 404; *Howard v. Bingham*, 420; *Gordon v. Sprott*, 472; instructions, *Whiteman v. Transportation Co.*, 701.

Negroes—Discrimination in excluding from jury, *S. v. Speller*, 549.

Neighborhood Public Road—*Raynor v. Ottoway*, 99.

Nonsuit—Upon nonsuit on one cause, defendant's evidence on remaining cause does not affect correctness of nonsuit, *Lamm v. Shingleton*, 10; on offense charged followed by submission of question of guilt of lesser degree is not nonsuit on indictment, *S. v. Matthews*, 617; one tort-feasor cannot complain of nonsuit as to plaintiff's cause against codefendant, *Whiteman v. Transportation Co.*, 701; challenges sufficiency of plaintiff's evidence taken as true, *Graham v. Gas Co.*, 680; consideration of evidence on motion to, *Higdon v. Jaffa*, 242; *Carson v. Doggett*, 629; *S. v. Church*, 39; on ground of contributory negligence, *Bruce v. Flying Service*, 181; *Fawley v. Bobo*, 203; *Bobbitt v. Haynes*, 373; *Bailey v. Michael*, 404; *Howard v. Bingham*, 420; *Gordon v. Sprott*, 472; in malicious prosecution granted because evidence showed that warrant was invalid, *Carson v. Doggett*, 629; sufficiency of evidence and nonsuit in assault prosecutions, *S. v. Church*, 39; in prosecutions for assault with automobile, *S. v. Ashley*, 508; in prosecutions for reckless driving, *S. v. Merritt*, 59; *S. v. Perry*, 467; in drunken driving prosecutions, *S. v. Parsons*, 599; on issue of *respondeat superior*, *Jones v. Tobacco Co.*, 336; in prosecutions for assault on female, *S. v. McIver*, 313; in prosecutions for rape, *S. v. Speller*, 549; in homicide prosecutions, *S. v. Williams*, 214; *S. v. Chavis*, 307; *S. v. Jernigan*, 338; in manslaughter prosecutions, *S. v. Swinney*, 506; in prosecutions for burglary, *S. v. Robertson*, 211; in prosecutions for criminal trespass, *S. v. Baker*, 137; in prosecutions for willful failure to support illegitimate child, *S. v. Bowman*, 51; in prosecutions under intoxicating liquor laws, *S. v. Merritt*, 59; *S. v. Perry*, 467; in actions for extortion, *Hightower v. Thompson*, 491; in action against bailee for destruction of goods, *Wellington-Sears Co. v. Finishing Works*, 96; plaintiff's introduction in evidence of deed to defendants held not to warrant nonsuit in action in ejectment, *McDowell v. Staley*, 65; review of denial of motion for, *Bruce v. Flying Service*, 181; granting of nonsuit in Supreme Court, *S. v. Baker*, 136.

Nontax-Paid Whiskey—See Intoxicating Liquor.

N. C. Employment Security Com.—*Employment Security Com. v. Jarrell*, 381.

N. C. Workmen's Compensation Act—See Master and Servant.

Notice to Vacate—Is not required that there be separate notice for each action in summary ejectment, *Prentzas v. Morrow*, 330.

Nuisances—Enjoining pollution of air, *Elliott v. Swartz Industries*, 425; airport is not nuisance *per se*, *Barrier v. Troutman*, 47; abatement, *Barrier v. Troutman*, 47; *Stowe v. Gastonia*, 157.

Occupational Disease—Compensable under Workmen's Compensation Act, *Henry v. Leather Co.*, 447.

Officers—See Public Officers.

Opinion—Action of court in ordering defendant's witness arrested in presence of jury *held* error as disparaging witness, *S. v. McNeill*, 666; expression of, on evidence in

charge, *S. v. Merritt*, 59; *S. v. Rich*, 696.

Opinion Evidence—Witness may not give opinion as to mental capacity "to make a will," *In re Will of York*, 70.

Options—See Vendor and Purchaser.

Original Promise—*Pegram-West v. Ins. Co.*, 277.

Parent and Child—Adoption of children, see Adoption; willful failure to support illegitimate child, see Bastards; awarding custody of children in divorce action, see Divorce; parent's right in wrongful death of child under Colorado laws, *Caldwell v. Abernethy*, 692; covenant in deed to support parent, *Casstevens v. Casstevens*, 572; proof of nonaccess of husband, *S. v. Bowman*, 51; child may sue father's corporation for negligent injury. *Foy v. Electric Co.*, 161; child may not sue third person for disrupting family, *Henson v. Thomas*, 173; custody of child, *In re Cranford*, 91; abandonment of child, *In re Cranford*, 91; *S. v. Stone*, 324.

Parking—Contributory negligence in hitting vehicle parked on highway without lights, *Hollingsworth v. Grier*, 108.

Parks—Where condemnation of memorial park is threatened, trustee may transfer to government upon its agreement to maintain park, *Hospital v. Cone*, 292.

Parol Evidence—Incompetent under provisions of Statute of Frauds, see Frauds, Statute of; held admissible to show action of county board, *Roberts v. McDevitt*, 458; incompetent to explain deed in absence of latent ambiguity, *McKay v. Cameron*, 658.

Parol Trusts—See Trusts.

Partial Intestacy—*Sutton v. Quinnerly*, 669.

Parties—Carrier of liability insurance not proper party in action against injured person against insured, *Jordan v. Maynard*, 101; parties separately polluting stream may be joined in one action, *Stowe v. Gastonia*, 157; *McKinney v. Deneen*, 540; joinder of joint tort-feasor to enforce contribution, *Canestrino v. Powell*, 190; employer and insurance carrier not necessary parties in action by employee against third person tort-feasor, *Jones v. Elevator Co.*, 285; who must be served in tax lien foreclosure, *Wilmington v. Merrick*, 297; third party beneficiary may sue on contract, *Jones v. Elevator Co.*, 285; right of child to sue parent, *Foy v. Electric Co.*, 161.

Partition—*McDowell v. Staley*, 65.

Partnerships—Error in designating partnership as corporation and service on individual partner as officer of corporation *held* not service on individual as partner and does not stop running of statute of limitations in favor of partnership where corporation as designated is materially different from firm name, *Electric Membership Corp. v. Grannis Bros.*, 716; lessor is not partner, *Perkins v. Langdon*, 386.

Party Aggrieved—Who may appeal, *Canestrino v. Powell*, 190.

Patrolmen—Right to make arrest, *Galloway v. Dept. of Motor Vehicles* 447.

Payment—Burden of proof that mortgage had been paid, *Combs v. Porter*, 585.

Pendency of Prior Actions—Abatement of subsequent actions, *Reece v. Reece*, 321; *Prentzas v. Morrow*, 330; *Brothers v. Bakeries*, 428.

Per Stirpes—*Lide v. Mears*, 111.

Peremptory Instruction—Correct form of, *Trust Co. v. Casualty Co.*, 510.

Personalty—Prosecution for malicious injury to, *S. v. Baker*, 136.

Petition to Rehear—*In re Will of Franks*, 736; *Elcdge v. Light Co.*, 737.

Petroleum Products—Contract between distributor and retailer attempting to exclude competitors' products, Williamson v. Miller 722.

Photographs—Competency in evidence, *S. v. Chavis*, 307.

Physical Facts— *Bailey v. Michael*, 404.

Picketing—Contempt in willfully violating order enjoining, *Cotton Mills v. Abrams*, 431.

Planes—Liability of flying service for injury to gratuitous passenger. *Bruce v. Flying Service*, 181; authority of patrolmen to use plane in search for fugitive, *Galloway v. Dept. of Motor Vehicles*, 447.

Plea of Former Jeopardy—*S. v. Bowman*, 51.

Pleadings—In negligence actions, see Negligence; in actions under Declaratory Judgment Act, see Declaratory Judgment Act; in action on contract, *McCampbell v. Building & Loan Asso.*, 647; in action for wrongful death complaint need not allege action was begun in one year, *Colyar v. Motor Lines*, 318; *Bailey v. Michael*, 404; statutes of fraud must be pleaded, *McCampbell v. Building & Loan Asso.*, 647; review of orders on motions to strike, *Terry v. Coal Co.*, 103; *Parlier v. Drum*, 155; *Light Co., v. Bowman*, 332; *Scarboro v. Morgan*, 597; joinder of joint tort-feasor to enforce contribution, *Canestrino v. Powell*, 190; introduction in evidence of adversary's pleading, *McDowell v. Staley*, 65; *Browder v. Winston-Salem*, 400; complaint, *Davis v. Rhodes*, 71, *McCampbell v. Building & Loan Assn.*, 647; when pleading is "filed", *Bailey v. Davis*, 86; defendant may set up inconsistant defenses, *Light Co. v. Bowman*, 332; office and effect of demurrer, *Canestrino v. Powell*, 190; *McCampbell v. Building & Loan Assn.*, 647; *Horner v. Chamber of Commerce*, 440; *Penn v. Coastal Corp.*, 481; *Moore v. Ins. Co.*, 729; "speaking demurrer", *Reece v. Reece*, 321; demurrer for misjoiner of parties and causes, *Jordan v. Maynard*, 101; *Stowe v. Gastonia*, 157; demurrer for failure to state cause of action, *Davis v. Rhodes*, 71; *Bumgarner v. Bumgarner*, 600, *Steele v. Cotton Mills*, 637; filing answer to original complaint does not waive right to demur to amended complaint, *Davis v. Rhodes*, 71; amendment, *Davis v. Rhodes*, 71; *Allen v. Costner*, 340; *Casstevens v. Casstevens*, 572; *Light Co. v. Bowman*, 332; *Perkins v. Langdon*, 386; motion to make complaint more definite, *Davis v. Rhodes*, 71; judgment on pleadings, *Finance Co. v. Luck*, 110.

Police Officer—Chief of police must be resident of municipality, *Barlow v. Benfield*, 663.

Police Power—Does not authorize taking private property without compensation, *McKinney v. Deneen*, 540.

Pollution—Of streams, see Waters and Watercourses; of air, *Elliott v. Swartz Industries*, 425.

Power of Disposition—Devise with, *Langston v. Barfield*, 594.

Prayer for Relief—Is not controlling, *McCampbell v. Building & Loan Asso.*, 647.

Premature Appeals—*Parker v. Helms*, 334; *Veazey v. Durham*, 354; *Veazey v. Durham*, 357; *Perkins v. Sykes*, 488.

Premeditation—*S. v. Chavis*, 307.

Presumptions—No presumption that personal services rendered by daughter-in-law were gratuitous, *Lindley v. Frazier*, 44; presumption of legitimacy when child is born in wedlock, *S. v. Bowman*, 51; of mental capacity, *In re Will of York*, 70; *In re Will of Franks*, 252; that illegal possession of whiskey is for purpose of sale, *S. v. Merritt*, 59; charge *held* not erroneous as withdrawing presumption of innocence from jury, *S. v. Bridges*, 163; of truth of recitals in trustees deed, *Combs v. Porter*, 585; recording of deed of trust raises presumption of due execution, *Bank v. Sherrill*, 731; in favor of correctness of lower court's judgment,

S. v. Vinson, 603; *James v. Rogers*, 668.

Prima Facie—*Prima facie* case raises issue for jury, *Wellington-Sears Co. v. Finishing Works*, 96; defined, *Cameron v. Cameron*, 123; speed in excess of statutory limitation is unlawful, *Whiteman v. Transportation Co.*, 701; petition for permission to apply for *coram nobis* denied for want of *prima facie* showing, *S. v. Daniels*, 341.

Principal and Agent—Real estate agents, see Brokers; corporate agent, see Corporations; liability of principal for agent's driving, see Automobiles; relationship may not be created *in invitum*, *Johnson v. Orrell*, 197; special agents, *Iselin & Co. v. Saunders*, 642; action by third persons against principal, *Bruce v. Flying Service*, 181.

Principals—Where murder is committed pursuant to conspiracy each conspirator is equally guilty, *S. v. Chavis*, 307.

Prior Actions—Abatement of subsequent actions, *Reece v. Reece*, 321; *Prentzas v. Morrow*, 330; *Brothers v Bakeries;* 428.

Prisoners—Disciplinary punishment of as assault, *S. v. Carpenter*, 229.

Private Statute—Creation of court by, *In re Wingler*, 560.

Private Ways—*Raynor v. Ottoway*, 99.

Probable Cause—In action for malicious prosecution, *Carson v. Doggett*, 629.

Probate—Will in common form incompetent in caveat proceedings, *In re Will of Etheridge*, 502.

Probate Courts—Probate Jurisdiction, *In re Pitchi*, 485.

Process— Motion to set aside judgment for excusable neglect where process was served on statutory agent, *Townsend v. Coach Co.*, 81; general appearance to move to vacate judgment does not waive want of service, *Wilmington v. Merrick*, 297; parties having equity of redemption must be served *eo nomine* in action to foreclose tax lien, *Wilmington v. Merrick*, 297; service on officer of nonexistant corporation is not service on him as partner in firm of another name, *Electric Membership Corp. v. Grannis Bros.*, 716.

Prohibition—See Intoxicating Liquor.

Promise to Answer for Default or Debt of Another—*Pegram-West v. Ins. Co.*, 277.

Property—Malicious destruction of, *S. v. Baker*, 136.

Proximate Cause—*Cooley v. Baker*, 533.

Public Officers—Chief of police is public officer, *Barlow v. Benfield*, 663; appointment by boards, *Roberts v. McDevitt*, 458; *In re Wingler*, 560; *Barlow v. Benfield*, 663; *de facto* and *de jure officers*, *In re Wingler*, 560; liability of prison official for assault on convict, *S. v. Carpenter*, 229.

Public Policy — Contracts against, void, *In re Publishing Co.*, 395.

Public Purpose—Public hospital is, within meaning of constitutional limitations on taxation, *Hospital v. Comrs. of Durham*, 604.

Publication—Parties having equity of redemption must be served *eo nomine* in action to foreclose tax lien, *Wilmington v. Merrick*, 297.

Quantum Meruit—Recovery for personal services rendered decedent, *Lindley v. Frazier*, 44.

Questions of Law and of Fact—Where deed is unambiguous extent of easement granted is question of law, *Veazey v. Durham*, 357; competency of evidence is for court, credibility is for jury, *Graham v. Gas Co.*, 680.

Quo Warranto—Right to public office cannot be collaterally attacked unless incumbent is usurper, *In re Wingler*, 560; qualified voters may maintain, *Barlow v. Benfield*, 663.

Racial Discrimination—In excluding Negroes from jury, *S. v. Speller*, 549.

Railroads—Upon purchase of assets from receivers, rights of third

party to sue new corporation, *Canestrino v. Powell*, 190.

Rape—Assault on female, see Assault; prosecutions for rape, *S. v. Speller*, 549.

Real Estate Agents—See Brokers.

Reasonable Doubt—Charge of reasonable doubt "grows out of evidence" *held* not prejudicial when charge construed contextually, *S. v. Bryant*, 106.

Receivers—Upon purchase of assets from receivers, rights of third persons to sue new corporation, *Canestrino v. Powell*, 190; lien of employees of insolvent, *In re Publishing Co.*, 395.

Reception of Evidence—Court has power to permit State to offer additional evidence after it had rested, *S. v. Perry*, 467.

Reckless Driving—*S. v. Merritt*, 59; *S. v. Perry*, 467.

Recodification—Statute not brought forward in, repealed, *King v. Gates*, 537.

Record—Imports verity, *In re Will of Franks*, 736; *S. v. Chase*, 589; *S. v. Davis*, 664.

Reference—Compulsory reference *Parker v. Helms*, 334; *Veazey v. Durham*, 354; *Veazey v. Durham*, 357; review of report, *Macon v. Murray*, 61; trial upon exceptions, *Cherry v. Andrews*, 261.

Reformation of Instruments—Time cause of action accrues, *Lee v. Rhodes*, 602.

Registration—Grantee takes with notice of all facts affecting title which record discloses, *Higdon v. Jaffa*, 242; of chattel mortgages and conditional sales, see Chattel Mortgages and Conditional Sales; recording of deed of trust raises presumption of due execution, *Bank v. Sherrill*, 731.

Rehearing— *In re Will of Franks*, 736; *Eledge v. Light Co.*, 737.

Remainders—Contingent remainders, *Lide v. Mears*, 111; *Ellis v. Barnes*, 543; *Sutton v. Quinnerly*, 669.

Removal of Causes—Change of venue for convenience of witnesses, *Nichols v. Goldston*, 581.

Rents—Fact that rents are based on profits from business does not make landlord partner, *Perkins v. Langdon*, 386.

Renunciation of Life Estates—Accelerates vesting of remainder but not time of calling of roll to ascertain members of class, *Neill v. Bach*, 391.

Res Ipsa Loquitur—*Schueler v. Good Friend Corp.*, 416.

Res Judicata—*Sutton v. Quinnerly*, 669.

Residence—*Sheffield v. Walker*, 556.

Resident—Chief of police must be resident of municipality, *Barlow v. Benfield*, 663.

Residential Restrictions—*Bengel v. Barnes*, 667; *Higdon v. Jaffa*, 242.

Residuary Clauses—*Sutton v. Quinnerly*, 669; *Bank v. Brawley*, 687.

Respondeat Superior—*Jones v. Tobacco Co.*, 336.

Restraining Order—Contempt for willful disobediance of, *Cotton Mills v. Abrams*. 431.

Restrictive Covenants—In deeds, *Higdon v. Jaffa*, 242; *Bengel v. Barnes*, 667.

Resulting Trusts—See Trusts.

Reversion—Effect of sale or lease, *Perkins v. Langdon*, 386.

Robbery—Murder committed in perpetration of, *S. v. Brown*, 152; *S. v. Chavis*, 307; prosecutions for robbery, *S. v. Chase*, 589.

Rule Against Partial Intestacy— *Sutton v. Quinerly*, 669,

Rule in Shelley's Case—*Lide v. Mears*, 111; *Pittman v. Stanley*, 327.

Rural Police Force—Expenditure for is general county expense, *R. R. v. Mecklenburg County*, 148.

Safe Deposit Boxes—*Nichols v. Trust Co.*, 158.

Sales—Action for breach of contract to furnish watertight vault, *Lamm v. Shingleton*, 10; meeting of the minds and agreement, *Iselin & Co. v. Saunders*, 642; liability of

seller for inherently dangerous condition, *Gas Co. v. Montgomery Ward & Co.*, 270; warranties in sale by sample, *Iselin & Co. v. Saunders*, 642; action for purchase price, *Iselin & Co. v. Saunders*, 642; action for damages resulting from defect, *Gas Co. v. Montgomery Ward & Co.*, 270.

Samples—Sale by, *Iselin & Co. v. Saunders*, 642.

Scenic Highways—Where condemnation of memorial park is threatened, trustee may transfer to government upon its agreement to maintain park, *Hospital v. Cone*, 292.

Schools—Selection of school site, *Board of Education v. Lewis*, 661.

Scope of Employment—Liability of Gas company for negligence of driver in delivering fuel gas, *Graham v. Gas Co.*, 680.

Self-Defense—*S. v. Jernigan*, 338; *S. v. Pennell*, 651.

Service of Process—See Process.

Service of Statement of Case—Duty of appellant to make out and serve statement of case within time allowed, *S. v. Daniels*, 17; dismissal for failure to do so, *S. v. Medlin*, 162; *S. v. Jones*, 216; not necessary upon appeal from denial of motion relating solely to pleadings, *Reece v. Reece*, 321.

Severance Pay—As lien against employer's receivers, *In re Publishing Co.*, 395.

Sewage—Extent of easement created by deed for discharge of on land, *Veazey v. Durham*, 357.

Shelley's case—Rule in, *Lide v. Mears*, 111; *Pittman v. Stanley*, 327.

Sheriffs and Constables—Legislature may place county law enforcement officers under agency other than sheriff; expense is general expense of county, *R. R. v. Mecklenburg County*, 148.

"Signing of Judgment"—Sole exception or assignment of error to, presents only record for review, *Culbreth v. Britt Corp.*, 76; *Terry v. Coal Co.*, 103; *Burnsville v. Boone*, 577; *Hill v. Britt*, 713.

Silence—As implied admission of guilt, *S. v. Rich*, 696.

Snow and Ice—Suit by pedestrain for injuries resulting from fall on, *Browder v. Winston-Salem*, 400.

Sole Assignment of Error—To signing of judgment presents only sufficiency of record for review, *Culbreth v. Britt Corp.*, 76; *Terry v. Coal Co.*, 103; *Burnsville v. Boone*, 577; *Hill v. Britt*, 713.

Solicitor—Supreme Court will take judicial notice that solicitor must be out of office great part of time, *S. v. Daniels*, 17.

"Speaking Demurrer"—*Reece v. Reece* 321.

Special Agent—Party dealing with must ascertain extent of authority, *Iselin & Co. v. Saunders*, 642.

Special Judges— Jurisdiction of, *In re Cranford*, 91.

"Special Purpose"—Within meaning if Art. V, sec. 6, N. C. Constitution, *R. R. v. Mecklenburg County*, 148.

Specific Legacies—Ademption of, *Green v. Green*, 707.

Specific Legatees—Exclusion from share under residuary clause, *Bank v. Brawley*, 687.

Speed—See Automobiles.

State Highway & Public Works Com.—Disciplinary punishment of prisoner as assault, *S. v. Carpenter*, 229; may promulgate special speed restrictions, *Whiteman v. Transportation Co.*, 701.

State Highway Patrolmen—Right to make arrest, *Galloway v. Dept. of Motor Vehicles*, 447.

Statement of Case on Appeal—Duty of appellant to make out and serve within time allowed, *S. v. Daniels*, 17; dismissal for failure to do so, *S. v. Medlin*, 162; *S. v. Jones*, 216; not necessary upon appeal from denial of motion relating solely to pleadings, *Reece v. Reece*, 321.

States—In action for injury sustained in another state *lex fori* governs procedure, *lex loci* governs substantive rights, *Jones v. Elevator Co.*, 285; *Caldwell v. Abernethy*, 692.

Statute of Frauds—See Frauds, Statute of.

Statute of Limitations—See Limitations of Actions.

Statutes—Duty of court to declare void unconstitutional statutes, *Bowie v. West Jefferson*, 408; proscription against establishment of court by special act is not retroactive, *In re Wingler*, 561; statute in derogation of common law strictly construed. *McKinney v. Deneen*, 540; repeal by re-codification, *King v. Gates*, 537.

Stockholders—Mandamus to compel declaration of dividends, *Steele v. Cotton Mills*, 636.

Stopping—Of motor vehicle on highway without warning, *Fawley v. Bobo*, 203.

Store—Liability for burning of customer's coat which caught fire as customer passed stove, *Clontz v. Purser*, 162; liability for injury to customer from collapse of chair, *Schueler v. Good Friend Corp.*, 416.

Streams—See Waters and Watercourses.

Strike—As effecting right to unemployment compensation, *Employment Security Com. v. Jarrell*, 381; contempt in willfully violating order enjoining picketing, *Cotton Mills v. Abrams*, 431.

Subdivisions—Restrictive covenants, *Higdon v. Jaffa*, 242.

Subscribing Witnesses—To wills, *In re Will of Franks*, 252.

Substitute Trustees—Appointment of to preserve objective of trust, *Hospital v. Cone*, 292.

Summary Ejectment— *Ford v. Moulding Co.*, 105; *Prentzas v. Morrow*, 330.

Summons—See process.

Superior Courts—Jurisdiction of, see Courts; may not enter order out of county and out of term, *Cameron v. Cameron*, 123; appeals to, from referee, *Cherry v. Andrews*, 261; *Macon v. Murray*, 61; discretionary power of court during trial, *Pegram-West v. Ins. Co.*, 277; after appeal court is *functus officio*, *Cameron v. Cameron*, 123.

Supreme Court—Jurisdiction of Supreme Court on appeal and review, see Appeal and Error; may entertain application for permission to apply for writ of error *coram nobis*, *S. v. Daniels*, 17; petition for permission to apply for *coram nobis* denied for want of *prima facie* showing, *S. v. Daniels*, 341; arrest of judgment for fatally defective indictment, *S. v. Miller*, 419; when evenly divided in opinion judgment will be affirmed, *S. v. Vinson*, 603; *James v. Rogers*, 668.

Surface Waters—*Phillips v. Chesson*, 566.

Surprise and Excusable Neglect—Motion to set aside judgment for, see Judgments.

Swamp—Call in deed to, *Cherry v. Andrews*, 261.

"Taking"—Preliminary survey *held* insufficient to constitute taking of land for coastal toll road, *Penn v. Coastal Corp.*, 481.

Tax Collector—Election of, *Roberts v. McDevitt*, 458.

Taxation—Drainage assessments, *In re Canal Co.*, 131; special and general purposes of taxation, *R. R. v. Mecklenburg County*, 148; public purpose, *Hospital v. Comrs. of Durham*, 604; tax revenues cannot be given to chamber of commerce, *Horner v. Chamber of Commerce*, 440; proceeds from bond issue for hospital may be used for construction of nurses home, *Worley v. Johnston County*, 592; listing and assessment of property without notice and hearing is unconstitutional, *Bowie v. West Jefferson*, 408; foreclosure of liens, *Wilmington v. Merrick*, 297.

Tenants in Common—Partition, see Partition.

Tender—Is not required when adverse party denies contract, *Penny v. Nowell*, 154.

Tender of Issues—Where issues are sufficient refusal of issues tendered

is not error, *Whiteman v. Transportation Co.*, 701.

Theatres—Patron falling in theatre aisle *held* contributorily negligent as matter of law, *Gordon v. Sprott*, 472.

Theory of Trial—*Sutton v. Quinerly*, 669.

Third Party Beneficiary—Right to sue on contract, *Canestrino v. Powell*, 190.

Timber Deed—*McKay v. Cameron*, 658.

Tobacco Warehousemen — Tobacco warehousemen's association, *Warehouse Assn. v. Warehouse*, 142.

Toll Road—Preliminiary survey *held* insufficient to constitute taking of land for, *Penn v. Coastal Corp.*, 481.

Torts—Particular torts, see Particular Title of Torts; in actions for negligent injury occuring in another state *lex loci* governs substantive rights, *Jones v. Elevator Co.*, 285; *Caldwell v. Abernethy*, 692; distinction between action in tort and on contract, *Lamm v. Shingleton*, 10; wife may sue husband for negligent driving, *King v. Gates*, 537; child may sue parent's corporation for injury in automobile accident, *Foy v. Electric Co.*, 161; child may not maintain action against third person for criminal conversation, *Henson v. Thomas*, 173; parties separately polluting stream may be joined in one action, *Stowe v. Gastonia*, 157; *McKinney v. Deneen*, 540; employer and insurance carrier not necessary parties in action by employee against third person tort-feasor, *Jones v. Elevator Co.*, 285; execution of legal right cannot be tort, *Lodge v. Benevolent Assn.*, 522; liability of tort-feasors and contribution, *Powell v. Ingram*, 427; *Whiteman v. Transportation Co.*, 701; *Canestrino v. Powell*, 190; *Jones v. Elevator Co.*, 285; where plaintiff makes no demand against party joined by original defendant, nonsuit does not preclude subsequent action by injured party against person so joined, *Powell v. Ingram*, 427; rights of defendant *inter se* could have been litigated in action in the Federal Court and Federal judgment bars action in State Court on indemnity agreement, *Motor Lines v. Johnson*, 367.

Towns—See Municipal Corporations.

Trespass—Deposit of sediment resulting from mining operations, *McKinney v. Deneen*, 540; right to permanent damages, *Phillips v. Chesson*, 566; criminal trespass, *S. v. Baker*, 136.

Trial—Of criminal cases see Criminal Law; trial of particular actions, see Particular Titles of Action; continuance, *Elliott v. Swartz Industries*, 425; authority and acts of court, *Pegram-West v. Ins. Co.*, 277; argument, *Brown v. Vestal*, 56; nonsuit, *Graham v. Gas Co.*, 680; *Higdon v. Jaffa*, 242; *Carson v. Doggett*, 629; *Lamm v. Shingleton*, 10; form of directed verdict, *Trust Co. v. Casualty Co.*, 510; instructions, *Brown v. Vestal*, 56; issues, *Cherry v. Andrews*, 261; *Williams v. Williams*, 33; *Whiteman v. Transportation Co.*, 701; verdict, *Combs v. Porter*, 585; trial by court by agreement, *Burnsville v. Boone*, 577.

Truck Companies—Lessee of trucks for interstate commerce may not escape liability to public for negligent operation, *Motor Lines v. Johnson*, 367.

Trusts—Parol trusts, *Walker v. Walker*, 54; *Jones v. Brinson*, 63; express trust, *Sinclair v. Travis*, 345; resulting trusts, *Williams v. Williams*, 33; *Brown v. Vestal*, 56; constructive trust, *Walker v. Walker*, 54; appointment of successor trustees, *Hospital v. Cone*, 292; modification of trust by equity, *Hospital v. Cone*, 292; *Hospital v. Comrs. of Durham*, 604; sale of trust property by direction of cestuis, *Lodge v. Benevolent Assn.*, 522; termination of trust under terms of instrument, *Lide v. Mears*, 111.

Undertakers—Contractual duties in conducting funeral, *Lamm v. Shingleton*, 10.

Undue Influence—*In re Will of Franks*, 252.

Unemployment Compensation Commission — *Employment Security Com. v. Jarrell*, 381.

Unincorporated Associations—*Warehousemen's Asso. v. Warehouse*, 142; *Lodge v. Benevolent Asso.*, 522.

Unions—"Closed shop" provision is void but does not effect other valid provisions of employment contract, *In re Publishing Co.*, 395; contempt in willfully violating order enjoining picketing, *Cotton Mills v. Abrams*, 431; strike as affecting right to unemployment compensation, *Employment Security Com. v. Jarrell*, 381.

Usufruct—Husband is entitled to usufruct of lands held by entireties, *Williams v. Williams*, 33.

Usurpers—*In re Wingler*, 560.

Vacation Pay—As lien against employer's receiver, *In re Publishing Co.*, 395.

Variance—Between indictment and proof, *S. V. Baker*, 136.

Vault—Action for breach of contract to furnish watertight vault, *Lamm v. Shingleton*, 10.

Vendor and Purchaser—Requirements of Statute of Frauds, see Frauds, Statute of; tender of purchase price, *Penny v. Nowell*, 154; action for breach of contract, *Penny v. Nowell*, 154.

Venue—Actions against personal representatives, *Herring v. Coach* Co., 430; change of venue for convenience of witnesses, *Nichols v. Goldston*, 581.

Verdict—Correct form of peremptory instruction, *Trust Co. v. Casualty Co.*, 510; sufficiency of, *Combs v. Porter*, 585; where verdict is not responsive court may give additional instructions and have jury reconsider, *S. v. Matthews*, 617; error cured by verdict, *Nichols v. Trust Co.*, 158; *Veazey v. Durham*, 357; *Gray v. Power Co.*, 423; *Combs v. Porter*, 585; error not cured by verdict when error affects jury's answer to other issue, *Goins v. McLoud*, 655.

Vested Remainders—*Lide v. Mears*, 111

Veterans—Admission of testimony that plaintiff was in army *held* not prejudicial, *Combs v. Porter*, 585.

Waiver—General appearance to move to vacate judgment does not waive want of service, *Wilmington v. Merrick*, 297; of time for filing proof of loss and institution of action on fire policy, *Meekins v. Ins. Co.*, 452; definition of waiver, *Land Bank v. Bland*, 26.

Warehousemen—Tobacco warehousemen's association, *Warehouse Assn. v. Warehouse*, 142.

Warrant—See Indictment and Warrant.

Warranty—In sale by sample, *Iselin & Co. v. Saunders*, 642.

Warranty of Title—Suit on, *Culbreth v. Britt Corp.*, 76.

Waters and Watercourses—Extent of easement created by deed for discharge of sewage on land, *Veazey v. Durham*, 357; pollution of streams, *Stowe v. Gastonia*, 157; *McKinney v. Deneen*, 540; diversion of surface waters, *Phillips v. Chesson*, 566.

Whiskey—See Intoxicating Liquor.

Widow—Is entitled to body of deceased husband for burial, *Lamm v. Shingleton*, 10.

Wills—Construction and operation of trusts created by wills, see Trusts; contracts to devise, *Sinclair v. Travis*, 345; signature and subscribing witnesses, *In re Will of Franks*, 252; effect of probate in common form, *In re Will of Winborne*, 463; caveat proceedings, *In re Will of Winborne*, 463; *In re Will of Franks*, 252; *In re Will of York*, 70; *In re Will of Etheridge*, 502; general rules of construction, *Lide v. Mears*, 111; *House v. House*, 218; *Sutton v. Quinnerly*, 670; *Bank v. Brawley*, 687; Rule in Shelley's Case, *Lide*

v Mears, 111; vested and contingent interests and defeasible fees, *Lide v. Mears*, 111; *House v. House*, 218; *Neill v. Bach*, 391; devises with power of disposition, *Langston v. Barfield*, 594; life estates and remainders, *Lide v. Mears*, 111; *Sutton v. Quinnerly*, 670; renunciation of life estate and acceleration of remainder, *Neill v. Bach*, 391; devises to class, *Lide v. Mears*, 111; *Neill v. Bach*, 391; designation of shares, *Bank v. Brawley*, 687; residuary clauses, *Sutton v. Quinnerly*, 670; ademption, *Green v. Green*, 707.

Witnesses — Witness may not testify as to mental capacity of testator "to make a will", *In re Will of York*, 70; testimony of transactions with decedents, *Goins v. McLoud*, 655; declarations by decedent against interest, *Towe v. Penland*, 504; testimony *held* a conclusion rather than an evidential fact, *S. v. Ashley*, 508; instruction on scrutiny to be given testimony of accomplice, *S. v. Hale*, 412; charge on scrutiny to be given testimony of defendant, *S. v. Parsons*, 599; remark of court in questioning witness *held* not sufficiently prejudicial to warrant new trial, *S. v. Perry*, 467; action of court in ordering defendant's witness arrested in presence of jury *held* error as disparaging witness, *S. v. McNeill*, 666; defendant entitled to have evidence of good character considered as substantive proof, *S. v. Davis*, 664; change of venue for convenience of, *Nichols v. Goldston*, 581.

Work and Labor—Recovery for personal services rendered decedent, *Lindley v. Frazier*, 44.

Workmen's Compensation Act—See Master and Servant.

Writ of Error Coram Nobis—Obtains in this State, *S. v. Daniels*, 17.

Wrongful Death—Actions for, see Death.

ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 6. Procedure to Raise Question of Pendency of Prior Action.

The pendency of a prior action between the parties is not jurisdictional but is only ground for abatement, and if the objection is not properly raised, the court in the second action has jurisdiction to proceed to judgment. *Reece v. Reece*, 321.

The pendency of a prior action between the parties may be taken advantage of by demurrer if the pendency of the prior action appears on the face of the complaint, and by answer if it does not so appear. *Ibid.*

Where plaintiff admits the pendency of a prior action between the parties, the court may take notice thereof *ex mero motu* even though the matter is not raised by proper procedure. *Ibid.*

§ 8. Pendency of Prior Action.

A plea in bar for pendency of a prior action between the parties is bad when it appears that at the time of the plea the prior action had been terminated by voluntary nonsuit. *Prentzas v. Morrow*, 330.

§ 9. Pendency of Prior Action—Identity of Actions.

Jurisdiction over the custody of the children born of the marriage rests exclusively in the court before whom the divorce action is pending, G.S. 50-13, and no order for the custody of the children may be entered in a later action by one of the parties for subsistence without divorce. *Reece v. Reece*, 321.

In order for the pendency of a prior action to be grounds for abating a subsequent action between the parties it must appear that the rights asserted in the second action may be litigated in the first. *Ibid.*

The right to alimony without divorce is statutory and must be asserted by independent action as provided by the statute, G.S. 50-16, and therefore the prior institution of an action by the husband for absolute divorce does not abate the wife's subsequent action for alimony without divorce, or deprive the court of power to award her alimony and counsel fees *pendente lite* therein, since her claim is not litigable in his suit. *Ibid.*

The pendency of an action involving the respective liabilities of three parties to a collision *inter se*, precludes a subsequent action by one of defendants therein against the other two parties based on the same collision, and the second action is properly abated upon answer alleging the facts. *Brothers v. Bakeries*, 428.

ACTIONS.

§ 7a. Distinction Between Actions in Tort and on Contract.

Where plaintiff alleges that defendants contracted to conduct the funeral of her husband, and that at the time of interment the top of the vault was not locked to the bottom, so that water and mud entered the vault and forced its top to the surface, the action is for breach of contract, and further allegations that such failure was negligent and careless does not convert it into an action in tort. *Lamm v. Shingleton*, 10.

§ 9. Time of Commencement of Action.

Where the complaint contains a defective statement of a good cause of action, an amendment correcting the defect does not introduce a new cause

ACTIONS—*Continued.*

of action and the action is commenced as of the time of the service of the original complaint and summons. *Davis v. Rhodes*, 71.

Service of amendment to complaint, even though additional summons is issued and served therewith inadvertantly, does not constitute a new cause of action. *Bumgarner v. Bumgarner*, 600.

ADOPTION.

§ 4. Jurisdiction.

Court may not proceed with adoption proceedings instituted upon consent of mother upon subsequent marriage of mother and child's reputed father, but proceedings should be revoked upon motion. *In re Adoption of Doe*, 1.

5. Notice and Parties.

Proceedings for adoption upon consent of mother alone should be vacated upon subsequent marriage of mother and reputed father of child. *In re Adoption of Doe*, 1.

§ 8. Preliminary Orders.

Superintendent of Public Welfare, upon order of reference directing him to make investigation to determine if child is proper child for adoption, should report marriage of mother and reputed father, since such marriage legitimizes the child and changes its status for adoption. *In re Adoption of Doe*, 1.

ALTERATION OF INSTRUMENTS.

§ 1. Effect of Alteration.

Where a broker, after the execution of the contract for the sale of property, inserts in the vendor's copy a provision for the payment of commissions, the vendor is not bound by the alteration unless he ratifies it, which involves both knowledge of the alteration and intent to ratify, and the mere fact that the contract as altered was left in the possession of the vendor does not put him on constructive notice of the alteration and is insufficient to establish ratification. *Johnson v. Orrell*, 197.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

An appeal lies as a matter of right in those cases prescribed by law, G.S. 1-271, G.S. 1-277, G.S. 1-279, G.S. 1-280; but in cases where no appeal is given by the law, the right of appeal does not exist, and right of appeal cannot be conferred by any action of the trial court. *Veazey v. Durham*, 357.

§ 2. Judgments and Orders Appealable—Premature Appeals.

An appeal from an order of compulsory reference in those instances authorized by statute is premature and will be dismissed. *Parker v. Helms*, 334.

An interlocutory order or judgment is not appealable unless it is a judicial decision affecting a substantial right claimed in the action or proceeding. *Veazey v. Durham*, 354; *Veazey v. Durham*, 357.

No appeal lies from the discretionary refusal of a motion for a compulsory reference. *Ibid.*

Where jury does not answer some of issues and cause is retained for trial of these issues, judgment entered on issues answered is a partial judgment

APPEAL AND ERROR—*Continued.*

and an appeal therefrom will be dismissed as fragmentary and premature. *Perkins v. Sykes*, 488.

§ 6a. Parties Entitled to Object and Take Exception.

Agreement to the submission of an issue by a party does not preclude an objection to its submission by such party when the agreement relates to the submission of the issue as the measure of accrued damage, and the issue is used as the basis for the adjudication of defendants' liability to plaintiff for monthly payments *in futuro*. *Casstevens v. Casstevens*, 572.

§ 6c (2). Exceptions to Judgment or to Signing of Judgment. (Review of, see hereunder, § 40a.)

An exception to the signing of the judgment is insufficient to bring up for review the findings of fact, or the competency and sufficiency of the evidence to support the findings and conclusions of the trial judge. *Burnsville v. Boone*, 577.

A sole exception and assignment of error to the order of the court allowing the adverse party's motion to strike certain allegations from the pleadings presents only the question whether error appears on the face of the record. *Scarboro v. Morgan*, 597.

§ 6c (3). Exceptions to Findings of Fact.

Exceptions to the findings of fact by the court and to each and every fact found is a broadside exception and does not bring up for review the findings of the trial court or the sufficiency of the evidence to support the findings, it being required that the exceptions and assignments of error particularly and specifically point out the alleged errors. *Burnsville v. Boone*, 577.

In the absence of proper exceptions to the findings of fact, exceptions to the admission of evidence and exceptions to the denial of appellant's motions for judgment as of nonsuit are ineffectual. *Ibid.*

§ 8. Theory of Trial in Lower Court.

An appeal will be determined in accordance with the theory of trial in the lower court. *Sutton v. Quinnerly*, 670.

§ 10a. Necessity for "Case on Appeal."

Upon appeal from the denial of a motion relating solely to the pleadings, the record proper constitutes the case to be filed in the Supreme Court, and no service or settlement of case on appeal is required. *Reece v. Reece*, 321.

§ 14. Powers of and Proceedings in Lower Court After Appeal.

After appeal from order awarding alimony *pendente lite* and custody of children, Superior Court is without authority to modify the order pending appeal. *Cameron v. Cameron*, 123.

An appeal from an appealable interlocutory order stays all further proceedings in the Superior Court until the matters are determined in the Supreme Court. *Veazey v. Durham*, 357.

The taking of an appeal from a nonappealable interlocutory order cannot deprive the Superior Court of jurisdiction to try and determine the case on its merits, since such attempted appeal is a nullity. *Ibid.*

Defendant's appeal from the denial of a motion for continuance does not deprive a court of equity from entering a temporary order in the cause restraining the maintenance of a nuisance. *Elliott v. Swartz Industries*, 425.

APPEAL AND ERROR—*Continued.*

§ 15. Acquisition of Jurisdiction by Supreme Court.

An attempted appeal from a nonappealable order confers no power on the Supreme Court to decide the appeal, and the Supreme Court must dismiss such appeal because it cannot properly exercise jurisdiction. *Veazey v. Durham*, 357.

§ 22. Conclusiveness and Effect of Record.

The record imports verity, and is binding upon the Supreme Court. *In re Will of Franks, Appendix*, 736.

§ 29. Briefs.

Exceptions in support of which no reason or argument is stated or authority cited in the brief are deemed abandoned. *Williams v. Williams*, 33.

§ 37. Scope and Extent of Review in General.

Where the mother of an illegitimate child, after her marriage to a person not its father, institutes *habeas corpus* proceedings against her aunt with whom she had left the child, to regain its custody, and the respondent files answer and thus makes a general appearance and at no time challenges the jurisdiction of the court, the Supreme Court, in its discretion, will treat the petition as a special proceeding under G.S. 50-13, and consider the appeal on its merits. *In re Cranford*, 91.

§ 38. Presumptions and Burden of Showing Error.

The burden is upon appellant not only to show error, but also that the alleged error was prejudicial. *Nichols v. Trust Co.*, 158; *Whiteman v. Transportation Co.*, 701.

Where Supreme Court is evenly divided in opinion, one Justice not sitting, judgment of lower court will be affirmed without becoming a precedent. *James v. Rogers*, 668.

§ 39a. Prejudicial and Harmless Error in General.

Exceptions relating to an issue answered in appellant's favor will not be considered. *Hill v. R. R.*, 499.

§ 39b. Error Cured by Verdict.

Where, in an action against a safe deposit company for alleged negligence resulting in the loss of specified personalty from the safe deposit box, the jury finds under instructions not excepted to that plaintiff did not have the property in the safe deposit box at the time in question, any errors in instructions in regard to the duty of a safe deposit company to a customer, are harmless. *Nichols v. Trust Co.*, 158.

Where appellee is entitled to directed verdit on issue answered by jury in its favor, any error in trial of issue is harmless. *Gray v. Power Co.*, 423. Answer to issue in accordance with rights of parties obtaining as matter of law, renders harmless any error in submitting issue to jury. *Veazey v. Durham*, 357.

Where the answer of the jury upon one of the issues is determinative of the rights of the parties, error in the charge of the court or in the admission of evidence relative to the other issues is harmless. *Combs v. Porter*, 585.

Prejudicial error in the trial of the issue of mental capacity entitles appellant to a new trial notwithstanding the affirmative finding of the jury upon the issue of fraud and undue influence when the mental condition of grantor

APPEAL AND ERROR—*Continued.*

is an eminent factor affecting the answer to the issue of fraud and undue influence. *Goins v. McLoud*, 655.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of testimony of one of plaintiffs that he was in the army and overseas for a period of time, offered in anticipation of the defense of the statute of limitations, *held* not prejudicial error, even though such defense was not interposed. *Combs v. Porter*, 585.

§ 39f. Harmless and Prejudicial Error in Instructions.

An immaterial error in the statement of contentions of the appellee will not be held for prejudicial error upon appellant's exception. *Pegram-West v. Ins. Co.*, 277.

When the charge is without prejudicial error when considered contextually, exceptions thereto will not be sustained. *Whiteman v. Transportation Co.*, 701.

§ 40a. Review of Exceptions or Assignments of Error to Judgment or Signing of Judgment.

A sole assignment of error that the court erred in signing the judgment appealed from presents only whether the facts agreed support the judgment and whether error appears on the face of the record. *Culbreth v. Britt Corp.*, 76; *Terry v. Coal Co.*, 103; *Burnsville v. Boone*, 577.

A sole assignment of error to the signing of the judgment will not be sustained when the judgment is amply supported by the lower court's findings and conclusions of law. *Hill v. Britt*, 713.

§ 40b. Review of Discretionary Matters.

The discretionary allowance of a motion to amend is not subject to review in the absence of abuse. *Light Co. v. Bowman*, 332.

A judgment or order rendered by the judge of the Superior Court in the exercise of a discretionary power is not subject to review in the absence of abuse of discretion. *Veazey v. Durham*, 357.

Appeals from discretionary orders of the trial court will be dismissed in the absence of abuse of discretion. *Elliott v. Swartz Industries*, 425.

§ 40d. Review of Findings of Fact.

The Supreme Court is not bound by a finding which is based on a conclusion of law. *In re Cranford*, 91.

The findings of fact of the trial court are conclusive on appeal if there be evidence to support them. *Burnsville v. Boone*, 577.

§ 40f. Review of Orders Relating to Pleadings.

The denial of a motion to strike certain allegations from the pleadings will ordinarily be affirmed on appeal when the matter can best be determined by rulings on the evidence. *Terry v. Coal Co.*, 103.

While ordinarily the Supreme Court will not attempt to chart the course of the trial upon appeal from denial of motion to strike allegations from the pleadings, in this action *ex contractu*, denial of motion, made in apt time, to strike allegations from the complaint alleging improper and annoying conduct on the part of defendant causing plaintiff nervous prostration and necessitating medical treatment, is reversed, since the reading of the pleadings would tend to prejudice defendant. *Parlier v. Drum*, 155.

APPEAL AND ERROR—*Continued.*

The Supreme Court will reverse an order denying a motion to strike when the matter complained of is irrelevant and would tend to prejudice movant when read to the jury even though evidence in support thereof is not admitted at the trial; but in the absence of such prejudice the Supreme Court will not attempt to chart the course of the trial by passing upon the relevancy or effect of the averments, but will leave the matter to be determined by rulings upon the evidence offered in support of the allegations. *Light Co. v. Bowman*, 332.

The Supreme Court will not attempt to chart the course of the trial on appeal from an order allowing the adverse party's motion to strike allegations from the pleadings, and the order will not be disturbed when no harm results to appellant therefrom. *Scarboro v. Morgan*, 597.

§ 40i. Review of Exceptions on Rulings on Motion of Nonsuit.

In passing upon an exception to the entering of a judgment of nonsuit, the Supreme Court cannot weigh the evidence but may determine only if it is legally sufficient in its inferences to be submitted to the jury. *Bruce v. Flying Service*, 182.

§ 40l. Review of Constitutional Questions.

Courts will not pass on constitutional questions until the necessity for doing so has arisen. *Horner v. Chamber of Commerce*, 440.

§ 43. Petitions to Rehear.

Affidavits of witnesses, tending to show facts in material respects different from their testimony as it appears in the record of the case on appeal, cannot be considered on petition to rehear, since the Supreme Court is bound by the record as filed. *In re Will of Franks, Appendix*, 736.

§ 51a. Force and Effect of Decisions of Supreme Court—Law of the Case.

The determination on a former appeal that exceptions taken to the report of the referee and tender of issue thereon made by defendant was a sufficient compliance with the rules to entitle him to a jury trial, precludes the matter, and plaintiff's motion upon the subsequent trial for judgment on the referee's report and objection to the submission of the issue tendered are properly overruled. *Cherry v. Andrews*, 261.

Principles of law enunciated on a former appeal become the law of the case, and exceptions to the charge and rulings of the court upon the subsequent trial in substantial accord with such principles will not be sustained. *Ibid.*

§ 51c. Interpretation of Decisions of the Supreme Court.

A decision of the Supreme Court must be interpreted with reference to the framework of the particular case. *In re Adoption of Doe*, 1.

§ 51d. Decisions and Mandates of Federal Supreme Court.

Where, in an action under the Federal Employers' Liability Act, decision of the Supreme Court of North Carolina that there was insufficient evidence of negligence to be submitted to the jury is reversed on appeal to the Supreme Court of the United States, the decision of the Federal Supreme Court becomes the law of the case and precludes nonsuit in the second trial upon substantially the same evidence. *Hill v. R. R.*, 499.

APPEARANCE.

§ 2b. Effect of General Appearance.

A general appearance to move to vacate a judgment does not waive the defect of want of service of process. *Wilmington v. Merrick*, 297.

A general appearance made on behalf of a purported corporation is not a general appearance on behalf of a partnership with a materially different firm name, none of whose members was a party to the action and against whom no cause of action is stated. *Electric Membership Corp. v. Grannis Bros.*, 717.

ARREST AND BAIL.

§ 1b. Right of Officer to Arrest Without Warrant.

Highway patrolman is authorized to arrest person accused of crime of violence, and to use airplane to reconnoiter in search for such fugitive. *Galloway v. Dept. of Motor Vehicles*, 447.

§ 8. Liabilities on Bail Bonds.

The liability on an appearance bond upon its forfeiture by nonappearance of the accused is the penal sum of the bond and not the fine or costs, the costs being deductible from the amount of the bond solely to ascertain the clear proceeds for the use of the public school fund. *Hightower v. Thompson*, 491.

ASSAULT.

§ 8e. Elements of Offense—Assault With Deadly Weapon.

In order to constitute assault with a deadly weapon no special intent is required beyond the intent to commit the unlawful act, which will be inferred or presumed from the act itself. *S. v. Matthews*, 617.

§ 8e. Elements of Offense—Assault on Female.

An assault on a female, committed by a man or boy over 18 years of age, is a misdemeanor punishable in the discretion of the court. *S. v. Church*, 39.

In order to constitute the offense of assault on a female it is not necessary that defendant have the present intent and ability to carry out the threat or menace, but it is sufficient if under the circumstances the character of the threat is such as to cause prosecutrix to go where she would not otherwise have gone or leave a place where she had a right to be. *S. v. McIver*, 313.

§ 12. Competency nad Relevancy of Evidence.

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, testimony as to a threat made by one of defendants against one of the prosecuting witnesses, in conjunction with testimony tending to establish his presence at the scene at the time of the offense, is competent as tending to implicate him. *S. v. Church*, 39.

§ 13. Sufficiency of Evidence and Nonsuit.

Testimony as to the identity of defendants as the parties, who in company with other unidentified persons, made a concerted assault with deadly weapons upon the prosecuting witnesses, *is held* sufficient to be submitted to the jury, and the fact that the State failed to introduce evidence as to the identity of such others is immaterial as to defendant's guilt. *S. v. Church*, 39.

Evidence tending to show that defendant deliberately planned to meet prosecutrix while she was on her way to work along the street of a city on

ASSAULT—*Continued.*

successive mornings about seven o'clock and before full daylight, that he went out of his way to directly approach her on her side of the path, and repeatedly made an indecent sexual proposal to her, frightening her and, on the occasion in question, causing her to run into the street to avoid him, *is held* sufficient to be submitted to the jury in this prosecution for assault on a female. *S. v. McIver*, 313.

§ 14a. Instructions in General.

Where the evidence discloses that defendants made an assault upon the prosecuting witnesses, each defendant being present, and acting in concert and aiding and abetting each other in making the assaults, all are principals and equally guilty, and defendants are not entitled to the submission to the jury of the question as to the guilt of each defendant separately as to assault upon a particular prosecuting witness. *S. v. Church*, 39.

§ 14c. Duty to Charge on Less Degrees of Crime.

Where in a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, the evidence tends to show assault upon a female at least, objection to the failure of the court to submit the question of defendants' guilt of simple assault cannot be sustained. *S. v. Church*, 39.

ASSOCIATIONS.

§ 1. Nature, Establishment and Existence.

An association of tobacco warehousemen organized to encourage fair trade practices in the business, which has no definite procedure to determine membership, is a voluntary organization notwithstanding it is incorporated without capital stock, and given the right to sue and be sued. *Warehouse Assn. v. Warehouse*, 142.

An unincorporated association is a body of individuals acting together for some common enterprise by methods and forms used by incorporated bodies, but without a corporate charter. *Lodge v. Benevolent Assn.*, 522.

At common law an unincorporated association has no legal entity and cannot contract, or take, hold or transfer property, or sue and be sued. *Ibid.*

§ 2. Membership.

Warehousemen who affiliate with the warehousemen's association, contribute to its support, attend its meetings and receive whatever benefits are derived, are members thereof notwithstanding that the association has promulgated no definite procedure to determine membership. *Ibid.*

§ 3. Rules and Regulations.

The charter and by-laws of an association constitute a contract between it and its members, and each member is deemed to have consented to all reasonable rules and regulations promulgated in accordance with its by-laws, which may be enforced by the association by injunction unless unreasonable, unlawful or contrary to public policy. *Ibid.*

The delegation by an association of power to its board of governors to promulgate rules and regulations for the orderly marketing and handling of tobacco on the auction warehouse floors of its members is insufficient to give its board of governors power to prohibit auction sales altogether. Thus where its board of governors is delegated authority to regulate sales, a rule pro-

ASSOCIATIONS—*Continued.*

hibiting sales unless attended by a buyer from each of three specified tobacco companies, is in excess of the delegated authority, and void. *Ibid.*

§ 4. Property and Conveyances.

A conveyance to an unincorporated association is not void at common law, but vests the title to the property conveyed in the members of the association as individuals. *Lodge v. Benevolent Assn.*, 522.

At common law, a conveyance of property to trustees for the benefit of an unincorporated association vests the legal title in the trustees who hold the same in trust for the individuals composing the association. *Ibid.*

Where property is conveyed to trustees for the benefit of an unincorporated association, the members of the association, acting unanimously, have the right to cause the trustees to convey the property to a person designated by them, even though the conveyance is not calculated to promote the objectives of the association. *Ibid.*

AUTOMOBILES.

§ 7. Safety Statutes and Ordinances in General.

Statutes regulating the operation of motor vehicles must be given a reasonable and realistic interpretation with regard to physical conditions to effect the legislative purpose to promote and not obstruct vehicular travel. *Cooley v. Baker*, 533.

The State Highway and Public Works Commission has authority to promulgate special speed restrictions at particular places on the highway when appropriate signs are properly erected. G.S. 20-141 (b), G.S. 20-141 (5) (d). *Whiteman v. Transportation Co.*, 701.

§ 8b. Distance Between Vehicles Traveling in Same Direction.

Evidence held to show contributory negligence as matter of law on part of driver in following too closely truck traveling in same direction and in failing to see that the truck had stopped at highway intersection. *Fawley v. Bobo*, 203.

§ 8c. Turning.

Motorist, in making left turn, is not required to see that movement is absolutely safe, or to give signal when he can not reasonably forsee that movement will affect operation of another vehicle. *Cooley v. Baker*, 533.

§ 8d. Stopping, Parking and Lights.

Complaint *held* to disclose contributory negligence as matter of law on part of plaintiff in hitting unlighted vehicle parked on highway. *Hollingsworth v. Grier*, 108.

Plaintiff *held* contributorily negligent as matter of law in hitting truck traveling ahead of him on highway when truck stopped, even though driver of truck failed to give signal for stop. *Fawley v. Bobo*, 203.

§ 8i. Intersections.

G.S. 20-156 (a) does not apply to vehicle entering highway intersection from public street. *Bobbitt v. Haynes*, 373. Failure to stop before entering highway intersection in obedience to stop sign is not negligence *per se* but only evidence of negligence. *Bobbitt v. Haynes*, 373; *Bailey v. Michael*, 404.

AUTOMOBILES—*Continued.*

Person entering intersection is entitled to assume that other motorists will obey duly promulgated speed restrictions. *Bobbitt v. Haynes*, 373.

§ 12a. Speed in General.

The statutory speed limit of 55 miles per hour on a highway does not relieve the driver of a vehicle from the duty of not exceeding a speed which is reasonable and prudent under the conditions existent or the duty to decrease speed when approaching an intersection or when hazards exist with respect to pedestrians, traffic or weather conditions, or the duty to observe special limitations on speed duly promulgated by the State Highway Commission or local authorities when appropriate signs giving notice thereof are duly erected. G.S. 20-141 (a) (b) (c) (d) (f). *Bobbitt v. Haynes*, 373.

Even in absence of statute, driver is negligent in exceeding speed which is reasonable and prudent under the conditions existing. *Ibid.*

The 1947 amendment to G.S. 20-141 provides that speed in excess of the limits fixed shall be "unlawful" rather than merely "*prima facie* evidence" that such speed is not reasonable or prudent. *Whiteman v. Transportation Co.*, 701.

§ 13. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

A motorist driving on his right side of the highway is not required to anticipate that a vehicle approaching from the opposite direction on its own side of the road will suddenly turn into his path, but has a right to expect that the approaching vehicle will remain on its own side of the road until the vehicles meet and pass in safety. *Jenkins v. Coach Co.*, 208.

§ 18a. Pleadings in Auto Accident Cases.

Complaint *held* to disclose contributory negligence as matter of law on part of plaintiff in hitting unlighted vehicle parked on highway. *Hollingsworth v. Grier*, 108.

§ 18b. Negligence and Proximate Cause.

Driver is not required to anticipate negligence on part of others. *Bobbitt v. Haynes*, 373.

§ 18d. Concurring and Intervening Negligence.

Where a motorist makes a left turn across a highway, without signaling, to enter a filling station, when a vehicle approaching from the opposite direction is some 900 feet away, and is struck by such other vehicle which was traveling approximately 70 miles per hour, the negligence of the driver of such other vehicle is the sole proximate cause of the accident. *Cooley v. Baker*, 533.

§ 18g (5). Evidence—Physical Facts.

While physical facts at the scene may speak louder than the testimony of witnesses, the failure of the driver of a car to retain control over it and bring it to a stop after a collision in which he has been seriously or fatally injured is ordinarily but a circumstance to be considered by the jury together with other facts and circumstances adduced by the evidence. *Bailey v. Michael*, 404.

§ 18h (3). Nonsuit on Ground of Contributory Negligence.

Driver ramming rear of vehicle he was following on highway held contributorily negligent as matter of law. *Fawley v. Bobo*, 203.

AUTOMOBILES—*Continued.*

Evidence *held* insufficient to show contributory negligence as matter of law on part of motorist entering intersection of State highway. *Bobbitt v. Haynes*, 373. Nonsuit on ground of contributory negligence *held* properly refused on conflicting evidence in regard to passing vehicle at intersection. *Howard v. Bingham*, 420. Nonsuit on ground of contributory negligence *held* properly refused on conflicting evidence as to speed of car in entering intersection with dominant highway. *Bailey v. Michael*, 404.

Plaintiff's testimony was to the effect that he was following a truck on the highway and was preparing to pass the truck when it suddenly turned to its left, so that plaintiff hit the rear of the truck. Plaintiff further testified that he was still in his right-hand lane when the impact occurred and that he did not see any signal or lights on the truck showing that the driver intended to turn. *Held:* Plaintiff's evidence discloses contributory negligence barring his recovery as a matter of law. *Moore v. Boone*, 494.

§ 24e. Sufficiency of Evidence and Nonsuit on Issue of Respondeat Superior.

Where plaintiff's own evidence tends to show that one defendant merely loaded its tobacco on the truck of a common carrier and that it had nothing further to do with the transportation of the goods after the bill of lading had been given therefor, such defendant's motion to nonsuit on the issue of *respondeat superior* in an action to recover for injuries received as a result of the alleged negligent operation of the truck, is without error. *Jones v. Tobacco Co.*, 336.

§ 28a. Homicide Prosecutions—Culpable Negligence.

When an act is in violation of a statute intended and designed to prevent injuries to persons, and is in itself dangerous, and death ensues, the person violating the statute may be held guilty of manslaughter, and in some circumstances of murder. *S. v. Swinney*, 506.

§ 28d. Homicide and Assault Prosecutions—Competency of Evidence.

Testimony of officers that defendant, in driving his car from a house along a driveway to the highway, attempted to strike the officers assembled in front of the driveway, *is held* a statement of conclusion rather than an evidential fact. *S. v. Ashley*, 508.

§ 28e. Homicide and Assault Prosecutions—Sufficiency of Evidence and Nonsuit.

Evidence that defendant was driving 55 to 70 miles per hour in a congested area where the statutory speed limit was 35 miles per hour, and struck an automobile traveling in the opposite direction, while defendant was on his left-hand side of the highway, resulting in the death of an occupant of the other vehicle, together with the physical surroundings and attendant circumstances of the occurrence, *is held* sufficient to be submitted to the jury on the charge of manslaughter. *S. v. Swinney*, 506.

Evidence tending to show that defendant, after he had been followed to a house by officers and while the officers were assembled in front of the driveway leading to the road, drove a car from behind the house into the driveway from one side of the driveway to the other and out into the road, *is held* insufficient to be submitted to the jury on a charge of assault with a deadly weapon, since the evidence affords a basis for the reasonable inference that

AUTOMOBILES—*Continued.*

defendant was seeking to avoid the officers and to escape rather than intentionally to injure them. *S. v. Ashley*, 508.

§ 29b. Prosecutions for Reckless Driving.

Evidence *held* sufficient for jury in this prosecution for reckless driving. *S. v. Merritt*, 59; *S. v. Perry*, 467.

§ 30d. Prosecutions for Drunken Driving.

Testimony of two witnesses to the effect that at the time in question defendant was drunk or intoxicated, *held* sufficient upon the question to be submitted to the jury in a prosecution for drunken driving. *S. v. Parsons*, 599.

AVIATION.

§ 6. Persons Liable for Injuries to or Death of Passenger.

Testimony disclosing that the president of defendant aviation corporation selected a pilot to fly in defendant's air show and gave the pilot complete charge of the plane which he was to use in the demonstration, *is held* sufficient to raise an inference that the pilot was the agent of the corporation in flying the plane in the air show. *Bruce v. Flying Service*, 181.

Evidence that intestate asked defendant's pilot if he would like to have a passenger while performing a maneuver the pilot was employed to perform, and that the pilot invited intestate to "come on," and that defendant's president was present, heard the conversation, and made no objection, *is held* sufficient to raise the inference that the pilot was authorized to take intestate up with him. *Ibid.*

§ 7. Duty to Gratuitous Passengers and Liability for Injury or Death.

The duty owed to a gratuituos passenger in a plane is to exercise ordinary care for his safety. *Bruce v. Flying Service*, 181.

The evidence tended to show that intestate was a gratuitous passenger in a plane in the execution of a maneuver in defendant's air show, that the particular maneuver was a "precision spin," that the pilot was instructed to begin the spin at 2,000 feet and make some three to five turns as appeared to the individual pilot to be safe and as necessity required, that he began the maneuver at 1,800 feet, made five and a half turns and apparently made no effort to pull out before the plane struck the ground. There was expert testimony that the maneuver was safe when properly executed, that the pilot should have pulled out of the spin when at least 500 feet from the ground, and that from a height of 1,800 feet only two or three turns could be made with safety. There was testimony that the plane had dual controls, but that the pilot was in charge of the plane and was in the instructor's seat. *Held:* That the pilot was in control of the plane at the time and that he was negligent in executing the maneuver are permissible inferences from the evidence, and the granting of defendant's motion to nonsuit was error. *Ibid.*

A person who is a voluntary passenger in a plane in the execution of a particular maneuver in an air demonstration cannot be held contributorily negligent as a matter of law in assuming the risk when there is expert testimony that such maneuver is normal and safe in the hands of a careful pilot, since the danger is not so obvious or eminent as to require an ordinarily prudent man to refrain therefrom. *Ibid.*

BAILMENT.

§ 1. Nature and Construction of Contracts of Bailment.

Where the owner delivers goods to another for processing at a fixed price and return to the owner, the contract is one of bailment for mutual benefit. *Wellington-Sears Co. v. Finishing Works*, 96.

§ 8. Actions for Damages to Property.

Admissions or proof that bailor delivered goods in good condition to bailee and that they were damaged by fire while in the bailee's possession establishes a *prima facie* case entitling bailor to go to the jury in the absence of some fatal admission or confession on its part. *Wellington-Sears Co. v. Finishing Works*, 96.

BASTARDS.

§ 5. Competency of Evidence in Prosecutions for Willful Failure to Support Illegitimate Child.

In a prosecution of defendant for willful failure to support his illegitimate child conceived during wedlock of the mother, the mother, while not competent to testify as to the nonaccess of her husband, is competent to testify as to acts of illicit intercourse of defendant, that he was the father of the child in question, and had admitted paternity and promised to provide for the child and had failed to do so after demand. *S. v. Bowman*, 51.

§ 6. Sufficiency of Evidence and Nonsuit in Prosecutions for Willful Failure to Support Illegitimate Child.

Evidence in this prosecution of defendant for willful failure to support his illegitimate child *is held* sufficient to be submitted to the jury. *S. v. Bowman*, 51.

§ 15. Effect of Legitimation.

Where the mother and the reputed father of a child born out of wedlock thereafter marry, the child acquires the status of legitimacy which accompanies it wherever it goes and is determinative of the rights and duties of the parents as to its custody and support. *In re Adoption of Doe*, 1.

BILLS AND NOTES.

§ 10. Distinctions and Definitions—Checks.

A check is a bill of exchange drawn on a bank and does not operate as an assignment of any part of the funds to the credit of the drawer until the check is presented to and accepted by the bank, and the drawer at any time prior to acceptance is at liberty to stop payment and to withdraw his funds from the bank. *In re Will of Winborne*, 463.

§ 18. Holders in Due Course.

The assignee of a nonnegotiable instrument for value and in good faith before maturity nevertheless takes same subject to all defenses which the debtor may have had against the assignor which are based upon facts existing at the time of the assignment or facts arising thereafter but prior to the debtor's knowledge of the assignment. *Iselin & Co. v. Saunders*, 642.

BOUNDARIES.

§ 3b. Calls to Natural Objects.

Where a call in plaintiff's deed is down a branch to a swamp then up said swamp, the question of whether the call runs to the edge of the swamp or further into the swamp to its thread is a question of fact for the determination of the jury from all attendant evidence, and exceptions to the charge which fairly and correctly submits this question to the jury and exceptions to the refusal to give requested instructions to the effect that as a matter of law the call would take the line to the thread of the swamp, cannot be sustained. *Cherry v. Andrews*, 261.

BROKERS.

§ 3. Creation of Relationship of Broker and Principal.

Where the owner of land has neither listed his property with a broker nor in any way engaged him to sell the property, no presumption of agency arises from the mere fact that the broker has contacted the owner with a prospective purchaser and that a sale has been consummated. *Johnson v. Orrell*, 197.

Where a broker declares upon a written contract for the recovery of commissions, his rights must stand or fall upon the contract and he may not establish the relationship of principal and agent through the negotiations of the parties culminating in the sale of the property. *Ibid.*

§ 10. Right to Commissions—Where Sale Is Consummated.

Where a broker, after the execution of the contract for the sale of property, inserts in the vendor's copy a provision for the payment of commissions, the vendor is not bound by the alteration unless he ratifies it, which involves both knowledge of the alteration and intent to ratify, and the mere fact that the contract as altered was left in the possession of the vendor does not put him on constructive notice of the alteration and is insufficient to establish ratification. *Johnson v. Orrell*, 197.

CARRIERS.

§ 5. Licensing and Franchise—Lessor and Lessees of Vehicles.

Where the holder of a franchise from the Interstate Commerce Commission for the transportation of goods in interstate commerce leases trucks from one not authorized to transport goods in interstate commerce and operates such trucks under its own franchise and license plates, such holder may not escape liability to the public for the negligent operation of such trucks. *Motor Lines v. Johnson*, 367.

§ 21a (1). Duties to and Liability for Injury to Passengers in General.

A motor carrier of passengers for hire is not an insurer of their safety but may be held liable for personal injuries proximately caused by its failure to exercise the highest degree of care for their safety compatible with the practical operation of its business. *Jenkins v. Coach Co.*, 208.

§ 21b. Injuries by Accident in Transit.

Evidence held insufficient to show that bus driver failed to use highest degree of care for safety of passengers. *Jenkins v. Coach Co.*, 208.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 8a. County in Which Instrument Must Be Registered.

A chattel mortgage or conditional sales contract is valid as against creditors or purchasers for value as of the time of registration in the proper county, and registration in any county other than that specified by law is of no effect. *Montague Brothers v. Shepherd*, 551; *Sheffield v. Walker*, 556.

The objective of the registration statutes is to give notice to creditors and purchasers for value from the mortgagor or vendee, and therefore the county of registration is that where interested parties would ordinarily look for information in regard thereto, *i.e.*, the county of the mortgagor's or vendee's residence, or, in case he is a nonresident, the county where the chattel is situated. *Montague Brothers v. Shepherd*, 551; *Sheffield v. Walker*, 556.

Where a chattel mortgage or conditional sales contract is registered in the proper county, subsequent change of residence of the mortgagor or vendee, or subsequent removal of the property to another county of the State, does not affect the lien, there being no requirement of a second registration in this State in either of these events. *Montague Brothers v. Shepherd*, 551.

A chattel is situated within the meaning of the registration statutes where it is regularly used day by day, or where it is regularly kept when not in actual use. *Ibid.*

Evidence *held* sufficient to support jury's finding that truck was situated in county where conditional sales contract was registered. *Ibid.*

The word "residence" as used in G.S. 47-20, G.S. 47-23, imports less than domicile and more than physical presence in the character of a mere transient, and means a fixed abode for the time being or actual personal residence. *Sheffield v. Walker*, 556.

The provisions of G.S. 47-20 and G.S. 47-23, that a conditional sales contract or chattel mortgage be registered in the county of the residence of the vendee or mortgagor, require registration in the county of his residence as distinguished from domicile to effectuate the purpose of the statutes to give notice to interested parties. *Ibid.*

§ 22½. Deficiency After Foreclosure and Personal Liability.

A title retaining conditional sales contract for personalty is in effect a chattel mortgage, and when the property has been repossessed upon default and sold at public auction under the terms of the conditional sales contract, such repossession is not a rescission and does not return title to the vendor for his own use but solely for the purpose of sale, and therefore the vendor may recover the deficiency after applying the proceeds of the sale to the purchase price. *Mitchell v. Battle*, 68.

CLERKS OF COURT.

§ 4. Probate Jurisdiction. (See, also, Wills.)

The clerk of the Superior Court when acting as probate judge is a court of general jurisdiction in respect to probate matters. *In re Pitchi*, 485.

Court's probate jurisdiction is invoked by proper petition and not filing of bond. *Ibid.*

§ 7. Jurisdiction of as Juvenile Court.

The jurisdiction of juvenile courts has been limited by Ch. 1010, Session Laws of 1949, so that either parent may maintain a special proceeding in

CLERKS OF COURT—*Continued.*

the Superior Court to obtain its custody in cases not covered by G.S. 17-39 or 50-13, prior to the amendment. *In re Cranford*, 91.

COMMON LAW.

The common law writ of *coram nobis* is available to a defendant to challenge the constitutionality of conviction for matters extraneous the record, G.S. 4-1. *S. v. Daniels*, 17.

So much of the common law as has not been abrogated or repealed by statute is in full force and effect within this State, G.S. 4-1. There is no common law right of action by children against a third party for disrupting the family circle and thereby depriving them of the affection and care of their parents. *Henson v. Thomas*, 173.

CONSTITUTIONAL LAW.

§ 10b. Duty and Power of Courts to Declare Statute Unconstitutional.

It is the duty of the Court to declare a statute unconstitutional when it is clearly so. *Bowie v. West Jefferson*, 408.

§ 11. Scope and Nature of Police Power in General.

While loss occasioned by restrictions upon the use of property in the exercise of the police power is not compensable, a direct entry upon and appropriation of private property for a public use does not come within this rule. *McKinney v. Deneen*, 540.

§ 21. "Due Process"—Notice and Hearing.

The intent and purpose of the statutes in regard to service of summons is to give notice and an opportunity to be heard, and where service is had upon a statutory process agent who is not in fact an agent or officer of defendant corporation, the imputation of the negligence of such process agent to the corporation so as to preclude it from moving to set aside a default judgment against it for surprise and excusable neglect would be a denial of due process of law. Fifth and Fourteenth Amendments to the Federal Constitution, Art. I, sec. 17, of the Constitution of North Carolina. *Townsend v. Coach Co.*, 81.

Due process of law means notice and hearing, and in that order. *Bowie v. West Jefferson*, 408.

Where a statute fails to provide requisite notice and hearing it must be declared unconstitutional notwithstanding that in its application administrative officials may give notice, since the statute must be tested by what it authorizes to be done rather than what has been done under it. *Ibid.*

§ 28. Full Faith and Credit to Foreign Judgments.

The decisions of our Federal Courts must be accorded the same faith and credit by us that we are required to give to the judicial proceedings of another state. *Motor Lines v. Johnson*, 367.

Judgment of another state cannot be collaterally attacked except for want of jurisdiction, fraud, or as being contrary to public policy. *Howland v. Stitzer*, 528.

§ 33. Right to Jury Trial.

It is not the right of a defendant to be tried by a jury of his own race or to have a representative of any particular race on the jury, but it is his

CONSTITUTIONAL LAW—*Continued.*

right to be tied by a competent jury from which members of his race have not been unlawfully excluded. *S. v. Speller*, 549.

CONTEMPT OF COURT.

§ 5. Willful Disobedience of Court Order.

Evidence *held* sufficient to support order finding defendants in contempt for willfully violating injunction relating to picketing. *Cotton Mills v. Abrams*, 431.

Evidence of acts of members of crowd *held* competent against all respondents who were members of crowd and acting in concert. *Ibid.*

The burden is upon respondents to show facts sufficient for the purpose of purging them of contempt when relied upon by them. *Ibid.*

Where it is found upon supporting evidence that each of respondents willfully and intentionally violated the terms of a restraining order, their oaths that their acts were not done with the motive of showing disrespect or contempt for the court will not purge them of the contempt. *Ibid.*

CONTRACTS.

§ 4. Acceptance and Mutuality.

Acceptance must be unconditional. *Iselin & Co. v. Saunders*, 642.

Where contract is made with independent party, he may not assign without consent, since party has right to select and determine with whom he will contract. *Ibid.*

§ 4½. Definiteness of Agreement—Vague and Uncertain Contracts.

A distributor's agreement for the sale of petroleum products which fails in any part of the instrument to stipulate the quantity of products to be sold and bought, and which nowhere binds the buyer to purchase exclusively from the seller, *is held* too vague and uncertain to be enforcible. *Williamson v. Miller*, 722.

§ 5. Consideration.

Promise to the injured person made by the carrier of liability insurance that insurer would pay all hospital and medical expenses, *is held* without consideration and unenforcable. *Jordan v. Maynard*, 101.

§ 7a. Contracts Against Public Policy.

While a provision in a contract which is against public policy will not be enforced, it will not affect other valid provisions of the contract when such provisions are severable and may be enforced entirely independently of the illegal provision. *In re Publishing Co.*, 395.

§ 8. General Rules of Construction.

The rule that the construction given the contract by the parties in their course of dealing thereunder will be considered in its interpretation cannot be enlarged beyond the function of construction so as to supply provisions entirely omitted from the instrument. *Williamson v. Miller*, 722.

It is the province of the courts to construe and not to make contracts for the parties. *Ibid.*

CONTRACTS—*Continued.*

Where there is no latent ambiguity in a contract, a patent defect of omission cannot be cured by matters *dehors* the instrument, and the construction of the contract is a matter of law for the court. *Ibid.*

A stipulation in a distributor's contract for the sale of petroleum products which gives the purchaser the right to display advertising matter furnished by the seller cannot be construed as making it obligatory upon the purchaser to display the advertising matter furnished. *Ibid.*

§ 19. Right of Third Party Beneficiary to Sue.

Where purchaser of assets from receivers agrees to assume the liabilities of the receivers in connection with the operation of the business, the contract is for the benefit of claimants against and creditors of the receivers, and a person injured in the operation of the business by the receivers may sue the new corporation. *Canestrino v. Powell*, 190.

Where the subject matter of a contract is a dangerous instrumentality or the breach of the contract involves imminent danger to the lives and property of others, a person injured as a result of a breach of the contract may sue the party whose breach resulted in his injury even though the injured person is not a party or privy to the contract, since the action is bottomed on negligence constituting a breach of duty imposed by law and not upon breach of the contract. *Jones v. Elevator Co.*, 285.

While an elevator is not necessarily an inherently dangerous instrumentality, it becomes imminently dangerous unless kept in proper repair, and therefore a party entitled to use an elevator in a building, who is injured by reason of the failure of a safety device devised to make it impossible to open a door to the elevator shaft unless the cage of the elevator is at that floor, may maintain an action against the party who is under continuing contractual duty to the owner of the building to maintain the elevator in proper repair. *Ibid.*

§ 21. Pleadings.

Allegations to the effect that the mortgagee agreed to have the mortgagor transfer the equity of redemption to plaintiffs, that plaintiffs would assume the loan and that the mortgagee would use the sum of $1,000.00, then remaining on hand out of the original loan, to complete the house on the premises, and that the mortgagee, after conveyance of the property in accordance with the agreement, failed and refused to use the balance of funds on hand to complete the house, *is held* sufficient to state a cause of action as against demurrer. *McCampbell v. Building & Loan Asso.*, 647.

§ 25a. Measure of Damages for Breach.

Damages recoverable for breach of contract are those which are the direct, natural and proximate result of the breach and which, in the ordinary course of events, could have been reasonably foreseen by the parties at the time of the execution of the contract. *Lamm v. Shingleton*, 10.

In commercial contracts, mental anguish and suffering by reason of the breach thereof are ordinarily not recoverable, since they are deemed too remote to have been in the contemplation of the parties at the time of its execution. *Ibid.*

Where a contract is personal and so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that mental anguish can reasonably be anticipated as a result of its breach, compensatory damages for mental suffering may be recovered. *Ibid.*

CONTRACTS—*Continued.*

Where the breach of a personal contract results in shock or fright which impairs plaintiff's health, there is a physical injury entitling plaintiff to compensatory damages regardless of whether the breach amounted to a willful or independent tort. *Ibid.*

CONVICTS.

§ 2. Discipline and Punishment.

The fact that disciplinary punishment inflicted on a prisoner by a prison official is administered in accordance with the rules and regulations of the State Highway and Public Works Commission does not render the prison official immune to prosecution for assault unless the particular regulation relied on is within the statutory authority of the Commission. G.S. 148-11, G.S. 148-20. The statute conferring authority to promulgate such rules and regulations is constitutional. *S. v. Carpenter*, 229.

A prison official is not immune from prosecution for assault in administering disciplinary punishment to a prisoner even though the mode of punishment be specified in valid regulations if in the manner of applying the punishment and the extent to which it is carried the punishment is unreasonable. *Ibid.*

Evidence in this prosecution of a prison official for assault that upon direction of defendant a prisoner was handcuffed to bars so that he could not assume a sitting or reclining position for a period of 50 to 60 hours, without food, with rest periods of 15 minutes every five hours, with further evidence by the prisoner that he was not always given the rest periods as prescribed, *is held* sufficient to overrule demurrer to the evidence. *Ibid.*

CORPORATIONS.

§ 6a (2). Duties and Authority of President.

The president of a corporation is *ex vi termini* its head and, nothing else appearing, may act for it in the business in which it is authorized to engage. *Pegram-West v. Ins. Co.*, 277.

The charter and by-laws and minutes of stockholders and directors' meetings are the best evidence of any restriction on the general authority of its president to act for the corporation, and parol testimony of such restrictions are incompetent. *Ibid.*

§ 16. Dividends.

In order to be entitled to *mandamus* to compel the declaration of dividends by a corporation, plaintiff stockholder must allege that the corporation has a surplus or net profits available for the payment of such dividends at the time the action is brought and the application for the writ is made. *Steele v. Cotton Mills*, 636.

The directors of a corporation are under legal duty to pay the whole of the accumulated profits in dividends subject to the limitation that neither the corporation's capital stock nor its working capital may be impaired. *Ibid.*

Allegation that defendant corporation, on a date specified, had undivided profits in a specified amount available for the payment of dividends, is insufficient to establish the existence of such sum on the date of the institution of the action, more than nine months after the date specified, and therefore is insufficient predicate for *mandamus* to compel the directors to declare a dividend. *Ibid.*

CORPORATIONS—*Continued.*

§ 19. Implied Corporate Powers.

A corporation authorized to engage in the business of lending money on mortgage security has implied power to obligate itself for payment of materials to be used in the construction of a building on the mortgaged premises for the purpose of enhancing its security. *Pegram-West v. Ins. Co.*, 277.

§ 20. Representation of Corporation by Officers and Agents.

Defendant corporation was engaged in the business of loaning money on mortgage security. The evidence disclosed that it had taken a mortgage on certain property and had advanced funds that went into the construction of a building thereon, that it wanted the building completed to improve its security, and that under these circumstances its president agreed with plaintiff, a lumber dealer, to pay for lumber to be used in the completion of the building. *Held:* Nonsuit was properly denied in plaintiff's action to recover the balance due on the purchase price of the lumber so furnished. *Pegram-West v. Ins. Co.*, 277.

§ 40. Reincorporation and Reorganization—Liabilities of New Corporation for Debts.

Where the new corporation, in purchasing the assets from the receivers, assumes all liabilities of the receivers in the operation of the business, the contract is for the benefit of third parties, and a person injured in the operation of the business by the receivers may sue the new corporation. *Canestrino v. Powell*, 190.

COSTS.

§ 3a. Successful Party.

Where a cause has been remanded on appeal, the taxing of costs will follow the final judgment. *Barrier v. Troutman*, 47.

§ 5. Items of Costs.

A provision in an order for removal that movant should pay "costs" of transporting the witnesses of the adverse party, *held* to mean "expense," since such "costs" are no part of the costs of the action. G.S. 6-1. *Nichols v. Goldston*, 581.

COUNTIES.

(Constitutional limitations on taxing power see Taxation.)

§ 1. Nature, Powers and Functions in General.

A county is a governmental unit of the State stemming from the common law and existing for the purpose of maintenance of law and order and to assure a large measure of local self-government. *R. R. v. Mecklenburg County*, 148.

§ 2. Governmental Powers.

While the Legislature has authority to place any group of law enforcement officers in a county under the supervision of an agency other than the sheriff, its action in doing so does not alter the essential nature of their work nor the purpose of expenditures for their maintenance. *R. R. v. Mecklenburg County*, 148.

What is necessary in the discharge by a county by its governmental functions is largely within the discretion of the governing board of the county,

COUNTIES—*Continued.*

subject to legislative limitations, and a county may levy taxes within constitutional limitations to provide funds necessary to the discharge of its governmental functions without legislative intervention. *Ibid.*

An indispensable governmental function of a county is to secure the public safety by enforcing law, maintaining order, preventing crime, apprehending criminals, and protecting its citizens in their person and property, which function the county officials have no right to disregard and no authority to abandon. *Ibid.*

§ 5. Duties and Authority of County Commissioners.

County commissioners *held* to have power to appoint some qualified person to act as tax manager for remainder of term upon vacancy in office. *Roberts v. McDevitt*, 458.

§ 7. County Tax Collector or Manager.

Laws relating to election of tax manager for Madison County. *Roberts v. McDevitt*, 458.

§ 8½. Minutes and Proceedings of Governing Boards.

Where there is no statutory requirement that a county sinking fund commission keeps written records of its proceedings and such commission keeps no written records, parol evidence is competent to show the action of the commission. *Roberts v. McDevitt*, 458.

§ 14. Purchase of Land by County.

A county may accept deed from the trustees of a charitable hospital for the hospital property and endowment upon condition that the property be used for general hospital purposes and be operated under the same name, since notwithstanding the instrument conveys a base, qualified, or determinable fee, the estate will endure forever unless the county should voluntarily cease to use the property for hospital purposes or should voluntarily change the name of the hospital. *Hospital v. Comrs. of Durham*, 604.

COURTS.

§ 1. Powers and Functions of Courts in General.

It is the province of the courts to declare the law as it exists and not to create causes of action by engaging in judicial empiricism. *Henson v. Thomas*, 173.

Courts exist so that every person may have remedy by due course of law for any injury done him in his lands, goods, person, or reputation; and justice shall be "administered without sale, denial, or delay." N. C. Const., Art. I, Sec. 35. *Veazey v. Durham*, 357.

§ 3a. Jurisdiction of Superior Courts in General.

The Superior Court possesses all the powers inherent in a court of equity prior to 1868. *Hospital v. Comrs. of Durham*, 604.

§ 4b. Appeals to Superior Court From County Courts.

The Superior Court on appeal has jurisdiction to allow an amendment to the warrant provided the charge as amended is within the jurisdiction of the county court. *S. v. Carpenter*, 229.

COURTS—*Continued.*

§ 4c. Appellate Jurisdiction of Superior Court on Appeal From Clerk.

Upon appeal from clerk, the Superior Court acquires jurisdiction of entire cause, and may exercise any discretionary powers properly pertaining to it. *Bailey v. Davis*, 86.

Affirmance of clerk's judgment on the pleadings will not be disturbed on further appeal to Supreme Court, since Superior Court had jurisdiction to enter the judgment. *Finance Co. v. Luck*, 110.

§ 5. Jurisdiction After Orders or Judgments of Another Superior Court Judge.

If a judge of the Superior Court enters an order without legal power to act in respect to the matter, such order is a nullity, and another Superior Court judge may disregard it without offending the rule which precludes one Superior Court judge from reviewing the decision of another. *Veazey v. Durham*, 357.

§ 8. Establishment of County, Municipal and Recorders' Courts.

Section 29 of Article II of the Constitution of N. C. forbidding the establishment of courts inferior to the Superior Court by any local, private, or special act, did not become a part of the Constitution until it was adopted by the qualified voters of the State in the general election in 1916, and therefore the General Assembly of 1913 acted within its constitutional limits in creating the Special Court of the Town of North Wilkesboro (Chap. 144, Private Laws of 1913), Art. IV, Sections 2, 12, Constitution of N. C. *In re Wingler*, 560.

§ 15. Conflict of Laws—Actions in Tort.

In an action to recover for negligent injury sustained in another state the *lex fori* governs the procedure but the *lex loci* determines the substantive rights of the parties. *Jones v. Elevator Co.*, 285.

An action to rcover for loss of services of a minor child, killed in an accident occurring in another state, must be determined by the laws of such other state. *Caldwell v. Abernethy*, 692.

CRIMINAL LAW.

§ 8b. Parties and Offenses—Principals.

Persons present and aiding and abetting each other in committing the offense are all principals and equally guilty. *S. v. Church*, 39.

§ 22. Former Jeopardy—Mistrial and New Trial.

Where in a prosecution for willful failure to support an illegitimate child, the court in its discretion withdraws a juror and orders a mistrial because it had not been made to appear that demand had been made upon defendant to support the child, the mistrial is ordered in the interest of justice and such disposition will not support a plea of former jeopardy in a subsequent prosecution for the same offense. *S. v. Bowman*, 51.

Where a new trial is awarded upon defendant's appeal from conviction of a lesser degree of the crime charged, the new trial will be upon the original bill of indictment charging the graver offense. *S. v. Chase*, 589.

§ 23. Former Jeopardy—Prosecution Under Void Warrant or Indictment.

Prosecution under a fatally defective indictment will not bar a subsequent prosecution. *S. v. Miller*, 419.

CRIMINAL LAW—*Continued.*

§ 28. Presumptions and Burden of Proof.

The State must prove defendant's guilt beyond a reasonable doubt. *S. v. Cranford*, 211.

§ 29b. Evidence of Guilt of Other Offenses.

In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously like tickets had been found in defendant's home, *is held* competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was engaged in operating a lottery. *S. v. Bryant*, 106.

In a prosecution for assault, evidence of a similar assault against another committed by defendant about two months prior to the occurrence under investigation, is competent to show *quo animo*, intent or design on his part. *S. v. Lowry*, 414.

§ 31g. Opinion Evidence—Identification by Sight or Appearance.

The fact that the testimony of a witness as to the identity of defendants is not positive does not render the testimony incompetent but goes only to its weight. *S. v. Church*, 39.

§ 33. Confessions.

Where defendant offers no testimony on the preliminary inquiry and the State's evidence does not show that defendant's confession was involuntary, defendant's exception to the admission of the confession in evidence cannot be sustained. *S. v. Brown*, 152.

The admonition of the prosecuting witness after seeking out one defendant on his own initiative, "you had better come clean," *is held* under the circumstances of this case, not to render defendant's confession involuntary. *S. v. Matthews*, 617.

Where one defendant makes a voluntary confession and another defendant, without persuasion or inducement, admits the correctness of the statement in response to simple questioning, the confession is competent as against the second defendant. *Ibid.*

The question of whether a confession is voluntary or involuntary must be determined upon the circumstances of each particular case. *Ibid.*

§ 34d. Flight as Implied Admission of Guilt.

Flight alone is insufficient to sustain conviction. *S. v. Cranford*, 211.

§ 34e. Silence as Implied Admission of Guilt.

Testimony to the effect that defendant's wife, who was mortally injured, stated to the witness in the presence of defendant so that he must have heard it, that defendant "did it," is competent when the evidence discloses that the circumstances were such as to call for a denial by defendant if the declaration were not true. *S. v. Rich*, 696.

§ 38d. Competency of Photographs in Evidence.

Where there is testimony that certain photographs accurately depicted the position of the body of deceased as it was found after the homicide, such photographs are competent for the restricted purpose of illustrating the testimony of the witnesses in regard thereto. *S. v. Chavis*, 307.

CRIMINAL LAW—*Continued.*

§ 40b. Character Evidence as Substantive Proof.

Defendant is entitled to have evidence of his general reputation as a man of good moral character considered by the jury as substantive proof of his innocence, and an instruction that it constituted "substantive evidence bearing upon the defendant's credibility as a witness" must be held for reversible error. *S. v. Davis*, 664.

§ 41g. Credibility of Accomplices.

The rule that the incriminating testimony of an accomplice should be scrutinized applies whether such testimony be supported or unsupported by other evidence in the case. *S. v. Hale*, 412.

§ 48e. Reception of Evidence—Reopening Case for Additional Evidence.

The trial court has discretionary power to permit the State to offer additional evidence after the State and the defendants have rested their case when such additional evidence has a direct bearing on the case and its existence was not known to the solicitor in time to have introduced it earlier, it not appearing that defendants were denied the privilege of offering testimony in rebuttal if they had so desired. *S. v. Perry*, 467.

§ 50d. Expression of Opinion by Court During Progress of Trial.

The trial court may not by remarks or questions impeach the credibility of a witness or in any manner convey to the jury the impression that the testimony of a witness, in the opinion of the court, is probably unworthy of belief. G.S. 1-180. *S. v. Perry*, 467.

But questions of court in this case *held* not sufficiently prejudicial to warrant new trial. *Ibid.*

In this prosecution of defendant for willful failure to support his illegitimate child, the action of the court, in the presence of the jury, in ordering the sheriff to take defendant's witness into custody immediately after the witness had testified for defendant that he had had intercourse with prosecutrix, must be held for prejudicial error as disparaging or impeaching the credibility of the witness in the eyes of the jury. *S. v. McNeill*, 666.

§ 52a (1). Consideration of Evidence on Motion to Nonsuit in General.

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State. *S. v. Church*, 39.

§ 52a (2). Sufficiency of Evidence to Overrule Nonsuit in General.

Testimony as to the identity of defendants as the parties, who in company with other unidentified persons, made a concerted assault with deadly weapons upon the prosecuting witnesses, *is held* sufficient to be submitted to the jury, and the fact that the State failed to introduce evidence as to the identity of such others is immaterial as to defendants' guilt. *S. v. Church*, 39.

§ 52a (3). Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

Evidence tending to show that upon arrival of police officers at the scene of a break-in in response to a telephone call, they saw the three defendants running up the street, that defendants got into a car and drove quickly away and were not stopped by the officers until after a ten mile chase, and that appealing defendant denied any knowledge of the break-in, *is held* insufficient to be submitted to the jury, and judgment of nonsuit is allowed in the Supreme Court on appeal. G.S. 15-173. *S. v. Cranford*, 211.

CRIMINAL LAW—*Continued.*

§ 52a (7). Nonsuit on One Count Only.

Instruction that court grants nonsuit on offense charged, followed by submission of question of guilt of lesser degree of offense charged, is not nonsuit on indictment. *S. v. Matthews*, 617.

§ 53b. Charge on Presumptions and Burden of Proof.

A charge that reasonable doubt is one growing "out of the evidence" will not be held for prejudicial error when immediately thereafter the court instructs the jury that, if after considering all the evidence, the jury did not have an abiding conviction of defendant's guilt to a moral certainty, then the jury would have a reasonable doubt. *S. v. Bryant*, 106.

Charge construed contextually *held* not error in failing to submit question of defendant's guilt to jury. *S. v. Bridges*, 163.

An instruction to the effect that only in the event the jury should not believe the testimony of defendant beyond a reasonable doubt should the jury return a verdict of not guilty, must be held for reversible error even though the defendant as a witness in his own behalf may have made admissions which would have to be discounted before an acquittal could be had. *S. v. Carpenter*, 229.

§ 53f. Expression of Opinion by Court on Weight or Credibility of Evidence.

Where the State's testimony that officers had picked up three gallons of whiskey thrown from defendant's car, is not contradicted, and the whiskey is introduced in evidence, a statement in the charge that the State "offered in evidence the whiskey picked up by the officers" cannot be held for error as an expression of opinion by the court. *S. v. Merritt*, 59.

The explanation by the court in its charge to the jury of the reasons why the court admitted in evidence testimony of dying declarations, even though the competency of such testimony was not for the jury, will not be held for reversible error, especially when the court further charges that the weight of the declarations is a matter for the jury to consider and that the jury should not give them any peculiar weight because they were dying declarations, but only such weight as the jury should find them entitled to receive. *S. v. Rich*, 696.

§ 53g. Duty to Submit Question of Guilt of Less Degrees of Crime.

Where there is no evidence of defendants' guilt of lesser degrees of the crime charged, the court is not required to submit the question to the jury. *S. v. Church*, 39; *S. v. Brown*, 152.

§ 53i. Charge on Credibility of Defendant as Witness.

Charge of the court as to the scrutiny to be given testimony of defendant in his own behalf, *held* without error. *S. v. Parsons*, 599.

§ 53j. Charge on Credibility of Witnesses.

While the court is not required to charge the jury as to the credibility of the testimony of an accomplice in the absence of a special request, when the court voluntarily undertakes to charge the jury on this aspect, it is under duty to state the rule correctly as applied to the evidence in the case. *S. v. Hale*, 412.

An instruction to the effect that the State contended that the testimony of accomplices offered by it was supported by other testimony adduced, followed

CRIMINAL LAW—*Continued.*

by an instruction that the unsupported testimony of an accomplice should be scrutinized, *is held* erroneous as susceptible to the interpretation that if the testimony of an accomplice be supported, the rule of scrutiny would not apply. *Ibid.*

§ 54a. Form and Sufficiency of Issues.

Ordinarily in a criminal action only the general issue of the guilt or innocence of defendant, to be orally answered, should be submitted to the jury, and the submission of several written issues is not usually advisable. *S. v. Stone*, 324.

§ 54e. Refusal to Accept Verdict; Additional Instruction and Redeliberation.

Where the jury renders a verdict that defendants were guilty as aiders and abettors, the court has the power to give additional instructions, supported by the evidence, to the effect that persons aiding and abetting in the commission of the offense, all being present, are guilty of the offense, and to direct the jury to retire and reconsider, and to accept a proper verdict of guilty after such reconsideration by the jury. *S. v. Matthews*, 617.

§ 56. Motions in Arrest of Judgment.

Where the warrant is sufficient to charge a criminal offense, motion in arrest of judgment for its insufficiency to charge a separate offense contained therein is properly denied. *S. v. Stone*, 324.

An instruction that the court grants a nonsuit on the offense charged in the indictment, followed by submission of the case on the question of defendants' guilt of a lesser degree of the offense charged, does not amount to a nonsuit on the indictment, G.S. 15-173, and perforce will not support a motion in arrest of judgment upon conviction of the lesser degree of the offense charged, G.S. 15-169. *S. v. Matthews*, 617.

§ 57d. Writs of Error Coram Nobis.

The common law writ of *coram nobis* is available to a defendant to challenge the constitutionality of conviction for matters extraneous the record, G.S. 4-1. *S. v. Daniels*, 17.

Application for permission to apply for a writ of error *coram nobis* must be made to the Supreme Court, where it will be allowed upon a *prima facie* showing, leaving the ultimate merits of the petition for the determination of the trial court, with the right of petitioner to appeal from an adverse ruling. N. C. Consitution, Art. IV, sec. 8. *Ibid.*

Petition denied for failure of movant to make out *prima facie* showing of substance. *S. v. Daniels*, 341.

§ 73a. Making Out and Service of Case on Appeal.

It is the sole responsibility of defendant's counsel to make out and serve statement of case on appeal within the time allowed and they are charged with knowledge of the procedure to be followed and with knowledge of the necessity of filing same within the time prescribed and the consequences of failure to do so. *S. v. Daniels*, 17.

Service of statement of case on appeal may be made by a proper officer by leaving a copy thereof in the office of the solicitor, G.S. 1-282. The Supreme Court will take judicial notice that a solicitor is perforce absent from his office much of the time in the prosecution of the docket in the various counties

CRIMINAL LAW—*Continued.*

of his district, hence the liberal method of service permitted under the statute. *Ibid.*

The rules relating to the time of service of statement of case on appeal are mandatory and not directive. *Ibid.*

§ 76a. Certiorari to Preserve Right to Review.

Where, upon defendants' petition for *certiorari*, it does not appear that delay of the court reporter or the voluminousness of the record presented insurmountable difficulties to serving case on appeal within the time allowed, but to the contrary, that case on appeal was ready for service within the time allowed and could have been served by a proper officer by leaving a copy in the office of the solicitor, defendants' petition for *certiorari* will be denied. The press of other duties upon defendants' counsel will not excuse failure to serve statement of case on appeal in time. *S. v. Daniels*, 17.

§ 77d. Conclusiveness and Effect of Record.

The Supreme Court is bound by the record as certified. *S. v. Chase*, 589; *S. v. Davis*, 664.

§ 78c. Necessity for Exceptions and Time for Taking Exception.

Where a remark or question by the court amounts to an expression of opinion, an exception thereto need not be taken at the time but may be taken after verdict. *S. v. Perry*, 467.

§ 80b (4). Dismissal for Failure to Prosecute Appeal.

Where defendant fails to serve case on appeal within the time allowed and takes no steps to perfect his appeal, the motion of the Attorney-General to docket and dismiss will be allowed, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to disclose error. *S. v. Medlin*, 162; *S. v. Jones*, 216; *S. v. Daniels*, 508.

§ 81b. Presumptions and Burden of Showing Error.

When Supreme Court is evenly divided in opinion, judgment of lower court will be affirmed without becoming a precedent. *S. v. Vinson*, 603.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

Where defendants are convicted of assault with a deadly weapon, the failure of the court to submit the question of their guilt of assault upon a female, if justified by the evidence, cannot be held for prejudicial error, since both offenses are misdemeanors punishable in the discretion of the court. *S. v. Church*, 39.

Charge construed contextually *held* not prejudicial as withdrawing question of innocence from jury. *S. v. Bridges*, 163.

§ 81c (3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of evidence as to a fact admitted by defendant cannot be held prejudicial. *S. v. Merritt*, 59.

The admission of testimony over objection cannot be held harmful when substantially identical testimony is admitted without objection. *S. v. Rich*, 696.

CRIMINAL LAW—*Continued.*

§ 81c (4). Harmless and Prejudicial Error—Error Relating to One Count Only.

Where equal sentences upon conviction of three separate charges are imposed to run concurrently, appellant must show error affecting all three counts in order to be entitled to a new trial or to arrest of judgment. *S. v. Merritt*, 59.

§ 81c (7). Harmless and Prejudicial Error in Course and Conduct of Trial.

A remark or question by the court during the progress of the trial, even though it amount to a prohibited expression of opinion by the court, will not entitle defendant to a new trial when the matter, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. *S. v. Perry*, 467.

Error committed by the court in submitting the question of defendant's guilt of a lesser degree of the offense charged cannot be prejudicial to defendant. *S. v. Chase*, 589.

§ 81f. Review of Exceptions to Refusal to Nonsuit.

Decision of the Supreme Court sustaining defendant's exceptions to the refusal of his motions for nonsuit has the force and effect of a verdict of not guilty. G.S. 15-173. *S. v. Baker*, 136.

§ 82. Motions in Supreme Court.

Petition in the Supreme Court for permission to apply to the Superior Court for a writ of error *coram nobis* must make out a *prima facie* showing of substance. *S. v. Daniels*, 341.

DEAD BODIES.

§ 1. Right to Possession for Burial.

The widow has the primary right to the possession of the body of her deceased husband and to control its burial. *Lamm v. Shingleton*, 10.

§ 2½. Contracts to Inter.

Where, in an action for breach of contract to furnish a watertight vault, plaintiff's evidence tends to show that water and mud entered the vault by reason of the fact that the top was not locked to the base at one end at the time of the original interment, but offers no evidence tending to show that the vault was not waterproof as represented by defendant undertakers, nonsuit is proper, there being no evidence of breach of warranty in the sale of the vault. *Lamm v. Shingleton*, 10.

Where an undertaker agrees to conduct a funeral, he impliedly covenants to perform the services contemplated in a good and workmanlike manner. *Ibid.*

Where plaintiff alleges that defendants contracted to conduct the funeral of her husband, and that at the time of interment the top of the vault was not locked to the bottom, so that water and mud entered the vault and forced its top to the surface, the action is for breach of contract, and further allegations that such failure was negligent and careless does not convert it into an action in tort. *Ibid.*

Where a widow alleges breach of contract by defendants to conduct the funeral of her husband in failing to lock the top of the vault to its base so

DEAD BODIES—*Continued.*

that water and mud seeped into the vault and forced its top to the surface, causing her shock which injured her health when she viewed the scene, compensatory damages for such suffering may be recovered. *Ibid.*

This action was instituted against undertakers for breach of contract to conduct the funeral of plaintiff's husband, plaintiff alleging that the top of the vault was not locked to its base at the time of interment so that water and mud seeped into the vault. Defendants' evidence was to the effect that they were without authority to make actual interments under the rules and regulations of the cemetery authorities, but that the interments were made exclusively by the cemetery authorities. *Held:* Defendants' evidence raised matters of defense for the consideration of the jury and does not compel judgment of nonsuit. *Ibid.*

DEATH.

§ 4. Time Within Which Action for Wrongful Death Must Be Instituted.

Where, in an action for wrongful death, the complaint discloses that the action was instituted within one year from the death, but plaintiff is thereafter permitted to amend the defective statement of his good cause of action by particularizing the acts of negligence complained of, the amendment does not introduce a new cause of action, and the cause is not barred by G.S. 28-173. *Davis v. Rhodes*, 71.

Right of action for wrongful death is solely statutory and the statutory requirement that the action be instituted within one year from the date of such death is a condition annexed to the right of action and not a limitation. *Colyar v. Motor Lines*, 318.

Plaintiff in an action for wrongful death is not required to allege in the complaint that the action was brought within one year from the date of death, but is required to show compliance with this statutory condition by proof upon the trial. *Ibid; Bailey v. Michael*, 404.

§ 5. Parties Who May Sue for Wrongful Death.

Under the laws of the State of Colorado, the surviving parent may maintain an action for loss of services of his minor child killed as a result of alleged negligence, and recover as compensatory damages, not exceeding $5,000, the amount which will fairly and reasonably compensate the parent for financial loss sustained by reason of the child's death, excluding recovery for mental anguish. *Caldwell v. Abernethy*, 692.

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Scope in General.

The court may not order that the interests of infant defendants in certain realty be sold in the absence of allegation or evidence that such sale would benefit them. Whether the inherent power of a court of equity to authorize such sales in proper instances may be exercised in proceedings under the Declaratory Judgment Act, *quære? Lide v. Mears*, 111.

§ 2a. Subject of Action.

An action to modify or reform the provisions of a judgment may not be maintained under the Declaratory Judgment Act. *Howard v. Stitzer*, 528.

DECLARATORY JUDGMENT ACT—*Continued.*

§ 2c. Existing Controversy.

The Declaratory Judgment Act does not authorize courts to give advisory opinions or academic legal guidance, but actions for declaratory judgments will lie for an adjudication of rights, status or other legal relations only when there is an actual or existing controversy between the parties. *Lide v. Mears*, 111.

Thus in absence of allegation that prospective purchaser had been obtained, court will not give opinion as to marketability of title. *Ibid.*

§ 4. Pleadings.

Pleadings must disclose existing controversy, and failure of defendant to demur cannot confer jurisdiction on court. *Lide v. Mears*, 111.

DEEDS.

§ 2a (1). Parties of the First Part in General.

Where the owners of land join in as grantors in the sheriff's deed to the purchaser at execution sale, the deed passes their title to the purchaser independently of any acts or participation by the sheriff under the execution sale, subject to the lien of any other judgments against them. *Land Bank v. Bland*, 26.

§ 2a (2). Competency of Grantor.

The burden of proving mental incapacity is upon the party attacking the deed on this ground. *Goins v. McLoud*, 655.

Party interested in event may testify as to transactions with decedent grantor when testimony relates solely to issue of mental capacity. *Ibid.*

Upon attack of a deed of bargain and sale on the ground of mental incapacity, interrogation of witnesses as to their opinion whether grantor knew the nature and extent of his property and the natural objects of his bounty and realized the full force and effect of his disposing of his property by deed, must be held for prejudicial error, the test of mental capacity to execute a deed being the ability to know and understand the nature, scope and effect of his act in executing same. *Ibid.*

§ 5. Signing, Sealing and Delivery.

Registration of deed with proper recitals raises presumption of execution, and grantor's testimony that she did not sign deed does not entitle her to directed verdict. *Bank v. Sherrill*, 731.

§ 6. Registration of Deeds of Gift.

Where there is no allegation or evidence that the deed attacked was a deed of gift, delay in recording does not invalidate the instrument. *Walker v. Walker*, 54.

§ 11. General Rules of Construction.

While every part of a deed should be considered in order to determine the intent of the grantor, where he uses technical words having a clearly defined legal significance under an accepted canon of construction which has become a settled rule of law and of property, there is no room for construction to ascertain the intent and the words must be given their legal meaning and effect. *Pittman v. Stanley*, 327.

DEEDS—*Continued.*

Each provision of a deed must be given effect in ascertaining the intent of the grantor from the entire instrument unless such provision is in irreconcilable conflict with another, or is contrary to public policy, or runs counter to some rule of law. *Ellis v. Barnes*, 543.

§ 13a. Estates Created by Construction of Instrument.

Conveyance to grantor's son for life, then to his issue, but if no issue then to living heirs of grantor *held* to vest contingent remainder in grantor's other children. *Ellis v. Barnes*, 543.

A *habendum* which provides that the grantee's fee after the reservation of a life estate should be defeasible if he should die without issue and that the remainder should vest in other children of the grantor upon the happening of the contingency, is not repugnant to a granting clause conveying the fee to the grantee after the reservation of the life estate. *Ibid.*

The office of the *habendum* is to define the extent of the ownership in the thing granted, and while it may not contradict the granting clause or introduce a stranger to the premises to take as a grantee, it may lessen, enlarge, explain, or qualify the estate granted in the premises and provide that a stranger take by way of remainder. *Ibid.*

A limitation by deed to the heirs of a living person will be construed to be to the children of such person, unless a contrary intention appear. *Ibid.*

§ 13b. Estates Created Under Rule in Shelley's Case.

A deed to grantor's wife "and to her heirs" by grantor, conveys a fee tail special, converted by our statute into a fee simple absolute. *Pittman v. Stanley*, 327.

§ 16b. Restrictive Covenants.

Each grantee and owner of land from such grantee may maintain suit against any other owner taking land with notice of restrictive covenants to enjoin violation of restrictions. *Higdon v. Jaffa*, 242. While general scheme of development is necessary, it is not required that there be absolute uniformity in detail of restrictions. *Ibid.* Owner may have separate contiguous subdivisions and develop each under different scheme. *Ibid.* Where there has been no violation of restrictions within subdivision, equity will not grant relief for change of conditions outside its boundaries. *Ibid.*

A purchaser of land is chargeable with notice of restrictive covenants if such covenants are contained in any recorded deed or other instrument in his line of title, even though it does not appear in his immediate deed, since he is charged with notice of every fact affecting his title which an examination of his record chain of title would disclose. *Ibid.*

Where the evidence discloses that business enterprises had invaded the subdivision in question with the acquiescence of those owning lots therein, and had so changed the character of the neighborhood as to make it impossible to accomplish the purpose intended by the restrictive covenants, nonsuit is properly entered in a suit to restrain defendants from violating covenants restricting the use of the property to residences. *Bengel v. Barnes*, 667.

§ 16c. Covenants to Support Grantor.

Where defendants have covenanted in their deed to support grantor for the remainder of her life and to provide her with all necessary medical and hospital expenses and to provide proper burial upon her death, liability of

DEEDS—*Continued.*

defendants *in futuro* cannot be adjudicated in a fixed monthly sum. *Casstevens v. Casstevens*, 572.

§ 17. Covenants and Warranty of Title.

Where grantors in the *mesne* conveyances are given notice by the ultimate grantee of an action contesting his title and are called upon to come in and defend the action in accordance with their respective covenants and warranties, they are bound by the adjudication of want of fee simple title in the ultimate grantee, and are concluded as to all defenses which could have been set up in that action. *Culbreth v. Britt Corp.*, 76.

Where successive grantors are bound by judgment that the ultimate grantee acquired only an estate *pur outre vie*, by reason of notice and demand upon them to come in and defend the action instituted by persons claiming the fee, and thereafter the grantee recovers against his immediate grantor on the covenant and warranty of title, such grantor may recover in turn against his grantor, and it is immaterial that no notice was given him of the first action for breach of warranty, since not this judgment, but the judgment against the ultimate grantee established failure of title by which he is concluded. *Ibid.*

§ 22. Timber Deeds.

A deed for timber of a specified size, with full right of ingress and egress to a specified date, with further provision that if grantee should not commence to cut timber within the time specified the deed should become null and void, *is held*, as a matter of legal construction, to give the grantee a reasonable time to cut and remove the timber covered by the deed after the expiration of the time stipulated. *McKay v. Cameron*, 658.

DIVORCE AND ALIMONY.

§ 12. Alimony Pendente Lite.

In order to award alimony *pendente lite*, the court is required to examine of the marriage, which is void because rendered out of term and outside the county, cannot be validated by a subsequent similar order signed in the county but without notice. *Cameron v. Cameron*, 123.

An order relating to alimony *pendente lite* and the custody of the children the evidence adduced by both parties and find the predicative facts in the exercise of his own sound judgment, and where defendant has offered evidence in rebuttal, a finding that the plaintiff had established such facts *prima facie* is insufficient to sustain the award. *Ibid.*

The findings of the court on motion for alimony *pendente lite* are solely for the purpose of the motion and are not binding on the parties nor competent upon the trial of the issues. *Bumgarner v. Bumgarner*, 600.

§ 14. Alimony Without Divorce.

The right to alimony without divorce is statutory and must be asserted by independent action as provided by the statute, G.S. 50-16, and therefore the prior institution of an action by the husband for absolute divorce does not abate the wife's subsequent action for alimony without divorce, or deprive the court of power to award her alimony and counsel fees *pendente lite* therein, since her claim is not litigable in his suit. *Reece v. Reece*, 321.

DIVORCE AND ALIMONY—*Continued.*

§ 16½. Modification of Decrees for Alimony.

Provision in a decree of divorce rendered by another state directing the payment of stipulated alimony to the wife for life is not subject to attack in this State on the ground that the remarriage of the wife entitled the husband to a modification of the decree under the laws of the state rendering the decree (Sec. 1172-c, Thompson's Laws of New York, 1942 Cumulative Supplement) since the right to modify the decree rests solely in the court which rendered it. *Howland v. Stitzer*, 528.

§ 17. Jurisdiction and Procedure to Award Custody of Children of Marriage.

Where, pending the hearing of an action for divorce, an order awarding the custody of the children is entered and an appeal taken therefrom, the judge of the Superior Court is *functus officio* and he has no authority to modify the order prior to the hearing of the cause on its merits. *Cameron v. Cameron*, 123.

Jurisdiction over the custody of the children born of the marriage rests exclusively in the court before whom the divorce action is pending, G.S. 50-13, and no order for the custody of the children may be entered in a later action by one of the parties for subsistence without divorce. *Reece v. Reece*, 321.

§ 19. Determination of Rights and Decree Awarding Custody of Children of Marriage.

An order awarding the custody of the children pending the hearing of the divorce action on its merits, upon findings that plaintiff had established her cause of action for divorce *prima facie*, and without findings as to the fitness of plaintiff to have the custody of the children, will be remanded. *Cameron v. Cameron*, 123.

DOMICILE.

§ 1. Definitions.

"Residence" means a person's actual place of abode, whether permanent or temporary; "domicile" denotes a person's permanent dwelling place to which, when absent, he has the intention of returning. Therefore, a person may have his residence in one place, and his domicile in another. *Sheffield v. Walker*, 556.

DRAINAGE DISTRICTS AND CORPORATIONS.

§ 1. Creation and Establishment.

In order to establish a drainage corporation it is necessary that a petition in conformity with G.S. 156-37 be filed and that commissioners be appointed and that they file a report in conformity with G.S. 156-38, and that there be an adjudication and confirmation of the report, G.S. 156-41. It is only after such confirmation that the corporation may be declared to exist and may proceed to organize and levy assessments, G.S. 156-42. *In re Canal Co.*, 131.

Where petitioners show only the granting of an easement in response to a petition by an individual to be allowed to drain into an existing canal on the lands of another under the provisions of G.S. 156-2, G.S. 156-3 and G.S. 156-10, such evidence is insufficient to show the establishment of a drainage corporation under the provisions of G.S. 156-37, *et seq. Ibid.*

DRAINAGE DISTRICTS AND CORPORATIONS—*Continued.*

§ 10. Validity and Attack of Assessments.

When the validity of a drainage assessment is challenged the burden is upon the drainage district or corporation to show that it was created in substantial compliance with the applicable statutes and that the assessments were levied pursuant to and in compliance with the statutory provisions. G.S. 156-37 through G.S. 156-43. *In re Canal Co.*, **131.**

The fact that most of the proprietors have paid the drainage assessments levied against their lands does not preclude another proprietor from attacking the validity of the assessments levied against her. *Ibid.*

EASEMENTS.

§ 5. Extent of Right.

Where the terms of an easement granted by deed are plain and unambiguous, its construction is for the court. *Veazey v. Durham*, 357.

An easement to transport sewage in a proper manner through underground pipes does not grant the right to cast sewage into an open watercourse across the land. *Ibid.*

EJECTMENT.

§ 1. Nature and Scope of Remedy of Summary Ejectment.

The relationship of landlord and tenant and the fact of holding over are the essentials of summary ejectment, and the question of improvements is not justiciable in such action. *Ford v. Moulding Co.*, 105.

§ 3. Notice to Vacate as Prerequisite to Summary Ejectment.

It is not required that there be a second notice to the tenant to vacate in order to sustain a subsequent action in ejectment after nonsuit, since such notice is not primarily a notice of intended legal action upon noncompliance, and does not lose its effectiveness because of the nonsuit. *Prentzas v. Morrow*, 330.

§ 7. Sufficiency of Evidence and Nonsuit in Actions in Summary Ejectment.

Evidence that the relationship of landlord and tenant existed between the parties and that defendants were holding over after the expiration of the term is sufficient to take the case to the jury and support judgment for plaintiff in summary ejectment, and defendants' claim in respect to improvements is outside the scope of the proceeding and not justiciable therein. *Ford v. Moulding Co.*, 105.

§ 17. Sufficiency of Evidence and Nonsuit in Actions in Ejectment.

Defendants in partition who plead sole seizin are not entitled to nonsuit on the ground that plaintiff had introduced in evidence deed conveying the property to them, since the introduction of the deed admits its execution, but not necessarily the truth of its recitals or its legal effect. In the present case plaintiff claimed as an heir-at-law, and the deed introduced in evidence recited that the grantors therein derived title as heirs of the same ancestor, and supported plaintiff's contention that he had not conveyed his interest in the land. *McDowell v. Staley*, 65.

ELECTIONS.

§ 16. Results of Election.

Where there is a tie in the vote of the qualified electors, there is no election and the office is vacant. *Roberts v. McDevitt*, 458.

§ 18a. Quo Warranto.

The qualified voters and taxpayers of a municipality may maintain *quo warranto* to determine the right of incumbent to hold a municipal office. *Barlow v. Benfield*, 663.

EMINENT DOMAIN.

§ 2. Necessity for Compensation.

Private property may not be taken even for a public use without compensation. *McKinney v. Deneen*, 540.

§ 3. Acts Constituting "Taking" of Property.

The mere threat to take a right of way under the power of eminent domain and an isolated act in going upon the land in making a preliminary survey, are insufficient to constitute a "taking." G.S. 40-3. *Penn v. Coastal Corp.*, 481.

The washing of tons of earth into stream incident to mica mining, and the deposit of the sediment by the stream on plaintiff's land, amounts to a direct entry upon the land and a "taking." *McKinney v. Deneen*, 540.

§ 21. Nature and Requisites of Proceedings to Assess Compensation.

The owner of land may not maintain a proceeding for the assessment of damages under G.S. 40-12 until there has been a taking of his property under the power of eminent domain, and demurrer to the petition is properly sustained when its allegations amount to no more than that respondent had threatened to take an easement and had made preliminary surveys incidental thereto, since in such instance the petition fails to allege a taking of the property. *Penn v. Coastal Corp.*, 481.

ESTOPPEL.

§ 7. Estoppel of Married Women.

The power of a married woman to effect a conveyance of her real property by estoppel *in pais* is delimited by Art. X, sec. 6, of the Constitution of North Carolina. *Bank v. Sherrill*, 731.

EVIDENCE.

§ 3. Judicial Notice of Laws of Other States.

Our courts will take judicial notice of the public laws of a sister state. *Caldwell v. Abernethy*, 692.

§ 7e. Burden of Proof—Prima Facie Proof.

Prima facie proof is any substantial evidence which, if not rebutted, is sufficient to support the cause of action or defense. *Cameron v. Cameron*, 123.

§ 29½. Admission in Evidence of Pleading of Adversary.

A party is entitled to introduce in evidence that part of a paragraph in the pleading of the adverse party which makes an admission of an independ-

EVIDENCE—*Continued.*

ent fact, without introducing in evidence the balance of the allegations in the paragraph. *McDowell v. Staley*, 65.

In an action against a municipality to recover for a pedestrian's fall on the snow and ice on a sidewalk, an allegation in the city's original answer, stricken by order of court, set up an ordinance requiring property owners to keep the sidewalks in front of their property free from ice and snow. *Held:* The exclusion of the allegation, offered as evidence by plaintiff, was not prejudicial, since such allegation does not tend to show negligence on the part of the city, and therefore is not pertinent and material. *Browder v. Winston-Salem*, 400.

§ 30b. Diagrams and Maps.

A witness may use a photograph or map or chart or diagram for the purpose of illustrating his testimony. *Cotton Mills v. Abrams*, 431.

§ 32. Transactions or Communications With Decedent or Lunatic.

A party interested in the event may testify as to transactions with a decedent when such testimony relates solely to the issue of mental capacity. *Goins v. McLoud*, 655.

§ 37. Best and Secondary Evidence in General.

Where a county board is not required to keep written records and keeps none, parol evidence is admissible to show action of the board. *Roberts v. McDevitt*, 458.

§ 39. Parol or Extrinsic Evidence Affecting Writings.

Where there is no latent ambiguity in a deed and no equity invoked, parol evidence to explain or alter the instrument, is incompetent. *McKay v. Cameron*, 658.

§ 41. Hearsay Evidence in General.

The fact that petitioners offer contradictory hearsay evidence does not render competent the hearsay evidence offered by respondents. *Towe v. Penland*, 504.

§ 43b. Hearsay Evidence—Declarations of Decedent Against Interest.

In this proceeding for partition, respondent claimed sole ownership upon his contention that he had conveyed petitioner his one-half interest in a lot inherited from his father under an agreement that he was to have the entire use of the *locus* owned by the parties as heirs at law of his mother. *Held:* Testimony of declarations by the mother prior to her death intestate tending to confirm the agreement as contended for by respondent is incompetent as hearsay. *Towe v. Penland*, 504.

§ 49. Invasion of Province of Jury by Opinion Evidence.

It is reversible error to permit witnesses to testify that in their opinion testator had sufficient mental capacity to "make a will" on the date in question, but testimony of a nonexpert witness should be limited to his opinion as to whether testator had sufficient mental capacity to know what he was doing, what property he had and to whom he wished to give it, it being the province of the jury to decide upon the evidence whether testator had sufficient mental capacity to make the will. *In re Will of York*, 70.

EXECUTION.

§ 16a. Preliminary Proceedings—Allotment of Homestead; Prior Sale of Personalty.

Where the judgment debtor waives his homestead in specific realty as to a particular judgment, the sheriff may sell the lands under execution without allotting homestead. *Land Bank v. Bland*, 26.

Where it is not made to appear that the judgment debtors possessed personalty, attack of the sale on the ground that the sheriff failed to satisfy the judgment out of the personalty is untenable, since it will be presumed that the sheriff levied on realty because he could not find any personalty. G.S. 1-313 (1). *Ibid.*

A judgment debtor waives his right to have his personalty first exhausted before sale of his realty under execution by requesting the sheriff to levy upon the realty, or by failing to disclose his personalty when the sheriff is about to make a levy. *Ibid.*

§ 16b. Time of Sale.

Upon the expiration of ten days after the sale during which the sale is held open for receipt of an advance bid, the right of the purchaser to deed becomes absolute, and when this right vests within ninety days after the issuance of execution the validity of the sale is not affected by delay of the sheriff in making formal return or in executing deed to the purchaser. *Land Bank v. Bland*, 26.

§ 22. Title and Rights of Purchaser.

The purchaser's right to deed becomes absolute upon the expiration of the ten days the sale must be kept open for advance bids, and the sheriff's deed relates back to the time of sale and operates to pass title as of that time. *Land Bank v. Bland*, 26.

§ 23½. Attack of Sale.

The requirement that the personalty of the judgment debtor be first exhausted before sale of his realty under execution is for the benefit of the judgment debtor and other judgment creditors may not attack the execution sale on the ground that this was not done. *Land Bank v. Bland*, 26.

EXECUTORS AND ADMINISTRATORS.

§ 2a. Jurisdiction to Appoint.

The jurisdiction of the clerk as probate judge is invoked by petition disclosing the requisite jurisdictional facts filed by some person entitled to qualify as executor or administrator. *In re Pitchi*, 485.

The giving of bond is not essential to the efficacy of the appointment of an executor or administrator by the probate judge, but the failure to give bond is an irregularity which renders the letters of administration voidable. *Ibid.*

§ 3. Removal and Revocation of Letters.

Where letters of administration have been issued by the probate judge they are valid and are not subject to collateral attack. *In re Pitchi*, 485.

Where, upon service of order to show cause why letters of administration should not be revoked for failure of the administrator to give bond, the administrator files bond with sufficient surety which is approved by the clerk, the irregularity is cured and the denial of the motion to vacate the letters of administration is not error. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 15d. Claims for Personal Services Rendered Decedent.

While there is no presumption that personal services rendered by a daughter-in-law are gratuitous, in her action against the estate of her father-in-law to recover for such services upon *quantum meruit* the burden still rests upon her to show circumstances from which it can be inferred that the services were rendered and received with a mutual understanding that they were to be paid for, but proof that such services were knowingly received raises such presumption. *Lindley v. Frazier*, 44.

Plaintiff's evidence was to the effect that she and her husband went to live with her father-in-law at his request, that her husband worked on the farm and received therefor wages or a share of the crop as agreed upon by them and that plaintiff did the cooking and household duties. Plaintiff's husband testified that his father stated he wanted him and his wife to have a home and that he had made a deed to them for a part of the tract, but there was no testimony connecting this to any promise by intestate. The deed was never delivered. *Held:* The evidence is insufficient to show an implied contract to pay for plaintiff's services, and nonsuit in her action to recover upon *quantum meruit* should have been entered. *Ibid.*

EXTORTION.

§ 2. Actions to Recover for Extortion.

The evidence tended to show that plaintiff had been found guilty *in absentia* upon a plea entered by plaintiff's brother-in-law, that the justice of the peace agreed that the fine might be paid the following week upon the agreement of plaintiff's bondsman to "stay on his bond," that payment not having been made, the justice of the peace notified the bondsman and issued him a capias upon request, and that the bondsman under threat of arrest extracted a sum several times the amount of the fine from plaintiff and the next day paid the amount of the fine into court. *Held:* Nonsuit in plaintiff's action for extortion was erroneously granted. *Hightower v. Thompson*, 491.

FORGERY.

§ 1. Elements of the Offense.

Person who knowingly and fraudulently presents check with intent that signature be taken as that of another person of same name, is guilty of forgery. *Trust Co. v. Casualty Co.*, 510.

FRAUDS, STATUTE OF.

§ 5. Promise to Answer for Debt or Default of Another.

An agreement by a mortgage company with a lumber dealer to pay for lumber to be used in the construction of a building on the mortgaged premises is an original promise which does not come within the purview of the statute of frauds, G.S. 22-1, and parol evidence of such agreement is competent. *Pegram-West v. Ins. Co.*, 277.

§ 9. Contracts Affecting Realty in General.

A parol agreement of the grantee to revest title in the grantor by destroying his deed, comes within the statute of frauds and is voidable at the election of the grantee. *Walker v. Walker*, 54.

FRAUDS, STATUTE OF—*Continued.*

§ 13. Contracts Affecting Realty—Pleadings.

The provisions of G.S. 22-2 may not be taken advantage of by demurrer. *McCampbell v. Building & Loan Asso.*, 647.

§ 15. Contracts Affecting Realty—Trial of Actions.

Nonsuit is properly entered in an action on a contract relating to the sale of realty when plaintiff introduces only oral evidence of the alleged written agreement. *Carpenter v. Yancey*, 160.

GAS.

§ 2. Liability of Gas Company in Service and Delivery.

Fuel gas is dangerous instrumentality requiring commensurate care. *Graham v. Gas Co.*, 680. Deliveryman who continues to fill gas storage tank after notice that fixture is leaking is guilty of negligence in performance of very duty with which he is entrusted. *Ibid.*

GIFTS.

§ 1. Nature and Essentials of Gifts Inter Vivos.

Present donative intent and actual or constructive delivery is necessary to gift *inter vivos*. *Sinclair v. Travis*, 345.

HABEAS CORPUS.

§ 3. To Obtain Custody of Minor Children.

Habeas corpus will not lie in proceedings by mother to obtain custody of child from aunt with whom she had left the child, but petition being so nearly similar to petition under 1949 amendment to G.S. 50-13, the court in its discretion, determines the matter. *In re Cranford*, 91.

Special judge may hear the petition. *Ibid.*

HIGHWAYS.

§ 9. Highway Patrol.

Where a Highway Patrolman is advised by a person that an armed convict had come to her home, made threats, and demanded food, such patrolman is given authority under G.S. 20-188 to arrest such convict. The word "accused" as used in the statute is used in the generic sense and does not import that the person to be arrested must have been accused of crime by judicial procedure, and armed robbery is a crime of violence within the meaning of the statute. *Galloway v. Dept. of Motor Vehicles*, 447.

The use of an airplane by members of the Highway Patrol in reconnoitering to locate a person sought to be arrested by them is not a departure from the terms of their employment. *Ibid.*

§ 11. Nature and Establishment of Neighborhood Public Roads.

Where it is controverted whether the road in question was used permissively as a way to a private cemetery or whether it was used by the public under claim of right to a community cemetery, petitioners are not entitled to have it adjudicated a neighborhood public road solely upon a finding by the jury that it was constructed or reconstructed with employment relief funds under

HIGHWAYS—*Continued.*

the supervision of the Department of Public Welfare. G.S. 136-67. *Raynor v. Ottoway*, 99.

Testimony that relief funds were used under authorization of the Department of Public Welfare on a cemetery project, and that the superviser in charge of the work, upon suggestion of an interested worker, had the workers improve the road to the cemetery, *is held* insufficient to establish that the reconstruction of the road was authorized or directed by the Department of Public Welfare within the meaning of G.S. 136-67. *Ibid.*

Evidence that petitioners used a road to a cemetery under claim of right upon their contention that the cemetery was a community burial ground, entitles them to go to the jury in a proceeding to establish the way as a neighborhood public road. *Ibid.*

HOMESTEAD.

§ 8. Waiver of Homestead Exemptions.

A written request by judgment debtors to the sheriff to sell lands under execution without the allotment of homestead to the end that the property might bring the highest price possible, and the joinder of the judgment debtors in the sheriff's deed to the purchaser, constitute an authorization and ratification of the act of the sheriff in making the execution sale without allotment of homestead and is a valid waiver by the judgment debtors of their homestead exemption in regard to that particular execution. *Land Bank v. Bland*, 26.

Homestead is a right created for the benefit of the judgment debtor, and therefore other judgment creditors cannot complain of a waiver by the debtor of this right in designated realty as to a particular judgment. N. C. Constitution, Art. X, sec. 2. *Ibid.*

HOMICIDE.

§ 1b. Distinctions Between Degrees of Homicide.

G.S. 14-17 does not change the common law definition of murder but merely divides murder as defined by the common law into two degrees. *S. v. Streeton*, 301.

§ 2. Parties and Offenses.

Where there is a conspiracy between defendants to rob the deceased and the killing is perpetrated in the execution of such conspiracy, each conspirator is guilty of murder in the first degree. *S. v. Chavis*, 307.

§ 3. Murder in First Degree in General.

One who, in attempting to kill one person after premeditation and deliberation, accidentally kills another, is guilty of murder in first degree. *S. v. Heller*, 67.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17. *S. v. Chavis*, 307.

§ 4c. Murder in the First Degree—Premeditation and Deliberation.

Premeditation is thought beforehand for some length of time, however short; and deliberation means an act is done in a cool state of blood and not under the influence of a violent passion aroused suddenly by some lawful or just cause or legal provocation. *S. v. Chavis*, 307.

HOMICIDE—*Continued.*

§ 4d. Murder Committed in Perpetration of Felony.

A murder committed in the perpetration or attempted commission of the felony of kidnapping or holding a human being for ransom, G.S. 14-39, constitutes murder in the first degree, G.S. 14-17, and an instruction to this effect upon supporting evidence cannot be held for error. *S. v. Streeton*, 301.

A murder committed in the perpetration or attempt to perpetrate a robbery or any felony is murder in the first degree, G.S. 14-17, and in such instance the State is not put to proof of premeditation and deliberation. *S. v. Chavis*, 307.

§ 5. Murder in the Second Degree.

The intentional killing of a human being with a deadly weapon implies malice, and if nothing else appears, constitutes murder in the second degree. *S. v. Chavis*, 307.

§ 8a. Manslaughter—Negligence or Culpability of Defendant.

Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice, but proximately resulting from the commission of an unlawful act not amounting to a felony, or to some act done in an unlawful or culpably negligent manner, when fatal consequences are not improbable under all of the facts existent at the time. *S. v. Williams*, 214.

§ 11. Self-Defense.

A person who is in his own home when an unprovoked assault is made upon him is not required to retreat, regardless of the nature of the assault, but is entitled to fight in his own defense. *S. v. Pennell*, 651.

§ 16. Presumptions and Burden of Proof.

Where the unlawful killing of a human being with a deadly weapon is established, the burden is upon the State to show premeditation and deliberation beyond a reasonable doubt in order to constitute the offense murder in the first degree. *S. v. Chavis*, 307.

Self-defense is an affirmative plea, with the burden of satisfaction cast upon the defendant. *S. v. Jernigan*, 338; *S. v. Pennell*, 651.

§ 18. Dying Declarations.

When at the time of making the declaration the declarant is in actual danger of impending death, has full apprehension of such danger, and death ensues, testimony of the declaration is competent. *S. v. Rich*, 696.

The competency of a dying declaration is a question of law for the trial court, and its ruling thereon will be reviewed only to determine whether there was evidence tending to show the facts necessary to support its decision. *Ibid.*

Testimony tending to show that a doctor, after examining the victim, informed her she was approaching impending death, and that thereupon she told him that she had been beaten by her husband and kicked in the abdomen, and death ensued from such injury, *is held* sufficient to sustain the trial court's ruling admitting the dying declaration in evidence even though declarant herself made no statement that she believed she was about to die. *Ibid.*

§ 21. Evidence of Premeditation and Deliberation.

In determining the question of premeditation and deliberation, the conduct of defendants, before and after, as well as at the time of, the homicide, and all attendant circumstances, are competent. *S. v. Chavis*, 307.

HOMICIDE—*Continued.*

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence that while bathing in a pond, defendant went to where deceased was standing in shallow water holding to a post, and against her will and over her protest that she could not swim, pulled her into deep water where she drowned, is sufficient to be submitted to the jury on the charge of involuntary manslaughter. *S. v. Williams*, 214.

Evidence tending to show that defendants conspired to rob deceased and that they killed him with deadly weapons in the perpetration of the robbery, is sufficient to take the issue of their guilt of murder in the first degree to the jury. *S. v. Chavis*, 307.

Defendant's confession introduced by the State tended to show that as a result of an altercation, deceased had made a pass at defendant, grabbed his watch and chain, and had reached back to get a bottle to throw at defendant, when defendant shot him. *Held:* Upon defendant's own statement it was a question for the jury as to whether defendant used excessive force or was justified in taking the life of the deceased, and the refusal of defendant's motion to nonsuit was not error. *S. v. Jernigan*, 338.

§ 27b. Charge on Presumptions and Burden of Proof.

Defendant entered a plea of not guilty. Defendant's confession, admitted in evidence without objection, disclosed a clear case of premeditated and deliberate murder. The State contended for a verdict of murder in the first degree and defendant contended that a verdict of murder in the second degree would meet the ends of justice. The court correctly charged on the presumption of innocence and in several portions of the charge instructed the jury that it was to pass upon the guilt or innocence of defendant, but in the final instructions charged the jury to take the case and say whether defendant was guilty of murder in the first degree or murder in the second degree. *Held:* The failure of the court to charge in each instance that the jury might find the defendant not guilty does not constitute prejudicial error in the light of the record, construing the charge in its entirety. *S. v. Bridges*, 163.

§ 27c. Instructions on Murder in First Degree.

In a prosecution for uxorcide where defendant's own testimony is to the effect that he did not intend to shoot his wife but intended to kill the person he thought to be her paramour whom he believed to be in the house, an instruction that if defendant feloniously and with premeditation and deliberation intended to kill another person and killed his wife instead, he would be guilty of murder in the first degree, cannot be held for prejudicial error. *S. v. Heller*, 67.

§ 27h. Duty to Submit Question of Guilt of Less Degrees of Crime.

Where all the evidence tends to show murder committed in the perpetration of a robbery, the court is not required to submit the question of defendant's guilt of the lesser offense of murder in the second degree. *S. v. Brown*, 152.

Where the evidence tends to show that defendant, while drunk, beat his wife, inflicting injuries causing her death, the refusal of the trial court to submit the question of defendant's guilt of the lesser offense of involuntary manslaughter is not error. *S. v. Rich*, 696.

§ 30. Appeal and Review.

Where testimony of statements of defendants is to the effect that defendants beat deceased over the head with a pistol and shotgun, causing him to

HOMICIDE—*Continued.*

fall to the floor, and it appears that deceased was later found with his skull crushed where he had fallen, the admission of expert testimony that deceased died from skull fracture "caused by the blows from the pistol and shotgun" cannot be held prejudicial. *S. v. Chavis*, 307.

HOSPITALS.

§ 6½. Public Hospitals.

Surplus left after erecting and equipping main hospital building may be used for construction of nurses' home. *Worley v. Johnston County*, 592.

A county which has acquired charitable hospitals has authority to execute operational leases to the trustees of the hospitals upon such terms and subject to such conditions as will carry out the purposes of G.S. 131, Art. 13B. *Hospital v. Comrs. of Durham*, 604.

HUNTING AND FISHING.

§ 3. Prosecutions for Violation of Regulatory Statutes.

An indictment charging that defendants did unlawfully take fish with the use of dynamite and explosives is insufficient to charge the statutory offense of placing explosives in waters of the State for the purpose of taking, killing or injuring fish, and defendants' motion in arrest of judgment is allowed. *S. v. Miller*, 419.

HUSBAND AND WIFE.

§ 11. Right to Maintain Action in Tort Against Spouse.

In this jurisdiction a wife may maintain an action against her husband for negligent injury, or if such injury results in death, her personal representative may maintain such action. *King v. Gates*, 537.

§ 12a. Contracts and Conveyances Between Husband and Wife in General.

Where the husband furnishes the purchase price for lands taken in the name of the wife it will be presumed that the lands were a gift to her, but he may overcome the presumption and establish a resulting trust by clear, strong and convincing proof that the parties intended at the time the property was conveyed that she hold title for his benefit or for their joint benefit. *Williams v. Williams*, 33.

Where the husband pays premiums on a policy of insurance on the life of the wife's father, in which the wife is named beneficiary, under an agreement between them that the proceeds of the policy should be used for the purchase of a joint home, *held*, the proceeds of the policy are not the property of the wife individually but she holds same as a trust fund, and the use of the proceeds for the purpose agreed constitutes a basis for a resulting trust in his favor notwithstanding title in the property is taken in the name of the wife. *Ibid.*

G.S. 52-12 does not apply in an action by the husband to establish a resulting trust in lands conveyed to the wife by a third person under agreement that she hold same for his benefit or for their joint benefit, since such agreement does not involve her separate estate. *Ibid.*

Where, in a husband's action to establish a resulting trust, it appears upon the uncontroverted facts that joint funds were used to make a down payment on property agreed to be purchased for a joint home, although the wife alone was named grantee in the deed, and that payments on the purchase money

HUSBAND AND WIFE—*Continued.*

mortgage were made with rents from the property, *held*, the husband has sufficiently established his payment of at least one-half of the purchase price of the property, since he was entitled exclusively to the rents from the property thus held in trust as an estate by entirety, and upon their subsequent divorce he may establish his tenancy in common under the resulting trust. *Ibid.*

§ 15b. Usufruct of Lands Held by Entireties.

During coverture the husband is entitled to the rents and profits from lands held by them by entireties to the exclusion of the wife. *Williams v. Williams*, 33.

§ 24. Issues, Verdict and Judgment in Prosecution for Abandonment.

When defendant sets up defense of adultery, court may submit issue in regard thereto in addition to issue of guilt or innocence. *S. v. Stone*, 324.

INDEMNITY.

§ 2c. Matters Secured.

Where an indemnity bond covers listed losses and not loss in general, a loss not listed is not an exception from general coverage, and insurer does not have the burden of showing that the loss sued on was due to a non-insured cause. *Trust Co. v. Casualty Co.*, 510.

The indemnity bond in suit did not cover loss caused directly or indirectly by forgery. The evidence disclosed that the loss in suit resulted from the cashing of checks by a person without a bank account, who signed his name and presented the checks with intent that the signature should be taken as that of another person of the same name who had funds on deposit. *Held:* a peremptory instruction that the loss was due directly or indirectly to forgery, and the entering of judgment for insurer upon the jury's affirmative finding, is without error. *Ibid.*

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

No indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all of the constituent elements of the crime sought to be charged. *S. v. Miller*, 419.

When a special intent is a constituent element of the crime, it must be alleged in the indictment, and failure to do so is fatal. *Ibid.*

§ 10. Identification of Person Charged.

A warrant must sufficiently identify the person accused, Fourth Amendment to the Constitution of the U. S., G.S. 15-19, G.S. 15-20. *Carson v. Doggett*, 629.

§ 15. Amendment.

On appeal to the Superior Court from a county court upon conviction for assault, the Superior Court has power to allow an amendment of the warrant by the addition of the words "inflicting serious injury" provided the charge as amended is within the jurisdiction of the county court (G.S. 7-405; G.S. 7-435; G.S. 7-149, Rule 12), since the amendment does not change the offense with which the defendant was charged. *S. v. Carpenter*, 229.

INDICTMENT AND WARRANT—*Continued.*

The court has discretionary power to permit the striking of certain words from the warrant and the substitution of other words of the same import in lieu thereof in order to make the warrant conform to the language of the statute. *S. v. Stone*, 324.

Our courts have authority to amend warrants defective in form, and even in substance, provided the amendment does not change the nature of the offense charged in the original warrant. G.S. 7-149 (12). *Carson v. Doggett*, 629.

§ 20. Variance.

Proof of destruction of fence in prosecution for malicious destruction of personalty constitutes fatal variance. *S. v. Baker*, 136.

INFANTS.

§ 2. Sale of Property for Reinvestment.

The court may not order that the interests of infant defendants in certain realty be sold in the absence of allegation or evidence that such sale would benefit them. Whether the inherent power of a court of equity to authorize such sales in proper instances may be exercised in proceedings under the Declaratory Judgment Act, *quære? Lide v. Mears*, 111.

INJUNCTIONS.

§ 3. Irreparable Injury.

In order for an injury to be irreparable it is not required that it be beyond the possibility of repair or compensation in damages, but it is sufficient if it be one to which complainant should not be required to submit or the other party to inflict and is of such continuous and frequent recurrence that reasonable redress cannot be had in a court of law. *Barrier v. Troutman*, 47.

§ 4d. Subjects of Injunctive Relief—Nuisances.

The injured party is entitled to restrain the operation of a business or enterprise, even though lawful, when he makes it appear that in its manner of operation it constitutes a private nuisance, but interference by the court should not extend beyond that which is necessary to correct the evil and prevent the injury. *Barrier v. Troutman*, 47.

Abatement of a private nuisance is not dependent upon recovery of damages. *Ibid.*

Plaintiff alleged that by reason of the topography and the manner of its use and operation, planes using the airport on adjoining property flew over plaintiff's clinic at a height of not more than 100 feet, so as to constitute a recurrent danger and disturbance to plaintiff and patients of his clinic. *Held:* The complaint alleges a private nuisance, and upon verdict of the jury that the airport constituted a nuisance as alleged in the complaint, plaintiff is entitled to enjoin such use notwithstanding the further finding of the jury that plaintiff had not been damaged in a special and peculiar way. *Ibid.*

§ 8. Issuance and Continuance to Hearing.

Defendant's appeal from the denial of a motion for continuance does not deprive a court of equity from entering a temporary order in the cause restraining the maintenance of a nuisance. *Elliott v. Swartz Industries*, 425.

The granting of a temporary order restraining the maintenance of a nuisance until the hearing is within the discretion of the trial court. *Ibid.*

INSURANCE.

§ 24a. Fire Insurance—Notice and Proof of Loss and Waiver.

Facts alleged *held* sufficient to show waiver of provision that satisfactory proof of loss be furnished within time stipulated in policy. *Meekins v. Ins. Co.*, 452.

§ 25a. Time Within Which Action on Fire Policy Must Be.

Statutory 12 months limitation is valid, but is contractual and may be waived. *Meekins v. Ins. Co.*, 452.

Facts alleged *held* sufficient to show waiver in this case. *Ibid.*

§ 43d. Liability and Collision Insurance—Construction of Policy in General.

A policy of liability insurance is for the protection and indemnity of insured, and neither by express terms nor underlying purpose is it made for the benefit of injured third parties. *Jordan v. Maynard*, 101.

§ 48. Liability and Collision Insurance—Rights of Injured Person Against Insurer.

Promise to the injured person made by the carrier of liability insurance that insurer would pay all hospital and medical expenses, *is held* without consideration and unenforceable. *Jordan v. Maynard*, 101.

In the action by the injured person against insured, all reference to liability insurance is prejudicial, and all such references should be stricken from the complaint. *Ibid.*

INTOXICATING LIQUOR.

§ 9b. Presumptions and Burden of Proof.

The warrant charged generally that defendant had in his possession "non-tax-paid whiskey for the purpose of sale." *Held:* Upon the facts of this case the word "non-tax-paid" was merely used to describe the whiskey and to designate it as unlawful rather than to restrict the offense charged to a violation of G.S. 18-50, and therefore the *prima facie* presumption from the possession of three gallons of such whiskey, that the possession was for the purpose of sale, obtains. *S. v. Merritt*, 59.

§ 9d. Sufficiency of Evidence and Nonsuit in Prosecutions Under Liquor Laws.

Evidence held sufficient on charges of illegal possession of whiskey for purpose of sale and unlawful transportation. *S. v. Merritt*, 59.

Evidence in this case *is held* sufficient to be submitted to the jury as to one defendant on the charges of illegal transportation and possession of intoxicating liquors and as to the other defendant on the charges of aiding and abetting therein. *S. v. Perry*, 467.

JUDGES.

§ 1. Appointment and Qualification.

Mayor, acting as special court, *held* at least *de facto* judge where commissioners have not exercised power to appoint judge of the court under authority of later statute. *In re Wingler*, 560.

JUDGES—*Continued.*

§ 2b. Special and Emergency Judges.

A special judge has concurrent jurisdiction with the judge of the district to hear a petition by a mother for custody of her child under the 1949 amendment to G.S. 50-13, provided the matter can be heard and determined during the term of court he is commissioned to hold. *In re Cranford*, 91.

JUDGMENTS.

§ 3½. Consent Judgments—Conditions and Enforcement.

Where agreement of defendant movant to pay the costs of transporting the adverse party's witnesses is incorporated in an order removing the cause to another county for the convenience of witnesses, plaintiff may recover upon the contract in an independent action, since such agreement is an independent obligation between the parties, or at least between the defendant and the court for the benefit of plaintiff, upon which he is entitled to sue. *Nichols v. Goldston*, 581.

§ 9. Judgments by Default in General.

Judgment by default may be entered only when defendant has not answered, and therefore when answer has been filed, even though after time for answering has expired, the clerk is without authority, so long as the answer remains filed of record, to enter judgment by default. G.S. 1-211; G.S. 1-214. Upon filing of answer and joinder of issues, the cause is, in effect, transmitted by operation of law to the Superior Court. G.S. 1-171. *Bailey v. Davis*, 86.

§ 17a. Form and Requisites of Judgments in General.

The two classes of judgments and orders of the Superior Court are: (1) Final judgments, which are those disposing of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court; and (2) interlocutory orders, which are those made during the pendency of an action which do not dispose of the case but leave it for further action by the trial court. *Veazey v. Durham*, 357.

§ 19. Time and Place of Rendition.

Judge may not render order in the cause out of term and out of the county except by consent; and later signing of similar order in the county, but without notice, cannot validate it. *Cameron v. Cameron*, 123.

§ 23. Life of Lien of Judgments.

Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of ten years from the date of the rendition of the judgment and not the date of docketing. G.S. 1-234, G.S. 1-306. *Land Bank v. Bland*, 26.

An action on a judgment does not extend the lien of the original judgment and the new judgment does not become a lien on the realty until docketed in the county wherein the land is situate, and therefore where the judgment debtors have conveyed the property prior to the docketing of the new judgment, their grantees take the land free from the lien of the original judgment after the expiration of ten years from the date the original judgment was rendered. *Ibid.*

§ 27a. Motions to Set Aside Default Judgments.

Service of summons was had on defendant bus company by service on an employee of the lessees of a bus station who sold tickets for the bus com-

JUDGMENTS—*Continued.*

panies using the station, G.S. 1-97 (1). The ticket saleswoman failed to notify defendant, and judgment by default final was taken against it. *Held:* The neglect of the ticket saleswoman will not be imputed to defendant, and the trial court had discretionary power to set aside the judgment upon a showing of meritorious defense. G.S. 1-220. *Townsend v. Coach Co.*, 81.

A motion in the cause to set aside a default judgment on the ground that at the time it was rendered by the clerk a duly filed answer appeared of record, *is held* not a motion to set aside for surprise and excusable neglect, since G.S. 1-220 applies only when the judgment is rendered according to the course and practice of the court. *Bailey v. Davis*, 86.

§ 27b. Attack of Void Judgments.

A general appearance made for the purpose of moving to vacate a judgment on the ground that movants were not made parties and served with process, and that therefore the judgment was void as to them, cannot have the effect of validating the judgment or waiving the defect. *Wilmington v. Merrick*, 297.

§ 28½. Validity and Attack of Foreign Judgments.

The judgment of another state may be collaterally attacked here only on the grounds of (1) lack of jurisdiction, (2) fraud in procurement, (3) being against public policy. *Howland v. Stitzer*, 528.

§ 29. Parties Concluded.

Where grantors in the *mesne* conveyances are given notice by the ultimate grantee of an action contesting his title and are called upon to come in and defend the action in accordance with their respective covenants and warranties, they are bound by the adjudication of want of fee simple title in the ultimate grantee, and are concluded as to all defenses which could have been set up in that action. *Culbreth v. Britt Corp.*, 76.

Adjudication that plaintiff had failed to state cause against one defendant as joint tort-feasor does not preclude other defendant from asserting cross-action for contribution. *Canestrino v. Powell*, 190.

§ 30. Matters Concluded.

In an action to construe a will, adjudication that the renunciation of the life estate by the life tenant accelerated the vesting of the remainder is *res judicata*, and precludes a defendant in an action to compel acceptance of deed from the remaindermen from contending that the remainder had not vested. *Neill v. Bach*, 391.

§ 32. Operation of Judgments as Bar to Subsequent Actions in General.

Where plaintiffs seek no relief from a party joined as a defendant by the original defendants for the purpose of contribution under G.S. 1-240, the liability of such defendant to plaintiffs is not at issue on the trial, and judgment for the original defendants does not preclude plaintiffs from later suing the party so joined. *Powell v. Ingram*, 427.

Where successive proceedings are instituted for the sale of separate parcels of real property devised *en masse* in a single item of a will and it appears that the parties to all the proceedings are the same or are privies to deceased parties, *held* an adjudication of the respective rights of the parties in the property is *res judicata* even though only a part of the property was involved

JUDGMENTS—*Continued.*

at the time of the rendition of the judgment, since title to all the lands devised by the single item of the will hangs upon the same thread. *Sutton v. Quinnerly*, 670.

§ 34. Operation of Judgments as Bar to Subsequent Actions—Federal Judgments.

In an action in the Federal Court, recovery was obtained for damages resulting from the collision of an automobile and a truck operated in interstate commerce under a lease by one defendant from the other defendant, the judgment therein holding the defendants to be jointly and severally liable to the plaintiffs in that action. *Held:* The judgment was tantamount to holding defendants to be joint tort-feasors as a matter of law and, under the Federal practice, the lessee had the right to set up therein any indemnity agreement of lessor, Federal Rule of Civil Procedure No. 14, 28 U.S.C.A. 723c, and therefore the Federal judgment bars a subsequent suit in the State Court by lessee against lessor to recover upon the indemnity agreement and precludes lessee from asserting that its liability was secondary. *Motor Lines v. Johnson*, 367.

JURY.

§ 3. Challenges to the Array.

Where it is found as a fact by the trial court upon supporting evidence, counsel for defendant having stated that they desire to offer no additional evidence relating thereto, that names of persons of both the white and colored races had been placed in the jury box without discrimination of any kind, his challenge to the array on the ground of racial discrimination is properly overruled. *S. v. Speller*, 549.

LABORERS' AND MATERIALMEN'S LIENS.

§ 8. Date of Attachment of Lien and Priorities.

A purchase money deed of trust stands upon the same footing as a purchase money mortgage, and its lien is superior to the lien for material which was begun to be furnished the purchaser while he was in possession under a lease with option to purchase, since no lien against the purchaser could attach prior to the lien of the deed of trust, the execution of the deed and the deed of trust being regarded as but one transaction. *Supply Co. v. Rivenbark*, 213.

LANDLORD AND TENANT.

§ 1. The Relationship.

The fact that lessor is to receive as rent a percentage of the proceeds or net profits of the business, does not constitute lessor a partner therein. *Perkins v. Langdon*, 386.

§ 3b. Sale of Reversion.

In the absence of a stipulation or covenant to the contrary, a landlord has a right to sell leased premises. *Perkins v. Langdon*, 386.

Lessees' allegations to the effect that lessor had sold the leased premises during the existence of their three year term, and that they had been damaged as a result of such sale, standing alone, are insufficient to state a cause of action. The rights of the respective parties upon the landlord's sale of the reversion discussed by MR. JUSTICE DENNY. *Ibid.*

LIMITATIONS OF ACTIONS.

§ 5b. Accrual of Cause of Action—Fraud.

The three year statute begins to run against a cause of action to reform an instrument for mutual mistake from the time the mistake is discovered or should have been discovered in the exercise of due diligence, and conflicting evidence in respect thereto presents a question for the jury and its verdict thereon is determinative. *Lee v. Rhodes*, 602.

§ 11. Institution of Action.

The institution of an action against a purported corporation will not stop the running of the statute of limitations in favor of a partnership until the process is amended or the members of the partnership are otherwise brought in and made parties. *Electric Membership Corp. v. Grannis Bros.*, 716.

MALICIOUS PROSECUTION.

§ 1a. Nature and Essentials of Right of Action in General.

In order to constitute an action for malicious prosecution there must be (1) the institution or the procurement of the institution of criminal proceedings, (2) without probable cause, (3) with malice, and (4) termination of the prosecution in plaintiff's favor. *Carson v. Doggett*, 629.

§ 3. Probable Cause.

Probable cause is the existence of facts and circumstances sufficient to induce a reasonably prudent man to believe the person charged is guilty of the offense, the criterion being apparent guilt as contra-distinguished from real guilt, and is a question of law for the court when the facts are admitted or established. *Carson v. Doggett*, 629.

The acquittal of the person charged does not make out a *prima facie* case of want of probable cause. *Ibid.*

§ 10. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to overrule nonsuit in this action for malicious prosecution. *Carson v. Doggett*, 629.

A motion for judgment as of nonsuit in an action for malicious prosecution challenges the validity of the warrant upon which the plaintiff was prosecuted, since if the warrant be invalid the action will not lie. *Ibid.*

The evidence tended to show that the warrant named a specified person, that another person, whom the accuser intended to have arrested, was arrested thereunder, and that after arrest the name of the person arrested was substituted for the name originally appearing in the warrant. There was no evidence that the name of the party to be arrested was unknown, and no question of inadvertence or amendment. *Held:* The evidence tends to make out a cause of action for false imprisonment rather than malicious prosecution, and defendant's motion to nonsuit the action for malicious prosecution should have been allowed. *Ibid.*

§ 11. Instructions.

An instruction merely defining probable cause is insufficient, it being required that the court charge the jury that if the jury should find certain facts by the greater weight of the evidence, whether such facts would or would not constitute probable cause. *Carson v. Doggett*, 629.

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus will not lie to redress a past legal wrong or to prevent a future legal injury, but lies solely at the instance of a person having a present legal right to demand the performance of a clear legal duty resting upon the party to be coerced by reason of his official status or by operation of law. *Steele v. Cotton Mills*, 636.

The duty of the party to be coerced must exist at the time suit for *mandamus* is begun and at the time application for the writ is made, since loss of a once-existing right, even during the pendency of the action, precludes the issuance of the writ. *Ibid.*

MASTER AND SERVANT.

§ 2. Contract of Employment.

Provisions for a "closed shop" in agreements executed subsequent to the effective date of Chap. 328, Session Laws of 1947, and such provisions in extensions of prior contracts executed subsequent to that date, are contrary to public policy and void. *Publishing Co., In re*, 395.

Provisions for paid vacations and severance pay are valid notwithstanding invalid provision for closed shop. *Publishing Co., In re*, 395.

§ 22a. Nature and Extent of Employer's Liability for Employee's Negligence in General.

In order to hold the employer liable for the negligence of the employee it must be made to appear (1) that the employee was negligent, (2) that the negligence of the employee was the proximate cause of the injury, and (3) that the relation of master and servant existed between the employer and the employee at the time of and in respect to the very transaction out of which the injury arose. *Graham v. Gas Co.*, 680.

§ 22b. "Employees" Within Rule of Liability of Master for Injuries to Third Persons.

Evidence *held* sufficient to show that pilot was employee of flying service in piloting plane in air show. *Bruce v. Flying Service*, 181.

§ 25b. Federal Employers' Liability Act.

The Federal decisions relating to the duty of the employer to furnish a reasonably safe place to work are controlling in an action under the Federal Employers' Liability Act. *Hill v. R. R.*, 499.

And decision of the Federal Supreme Court on appeal becomes the law of the case upon subsequent trial in the State court. *Ibid.*

§ 37. Nature and Construction of Compensation Act in General.

The rule that the Workmen's Compensation Act should be liberally construed cannot be employed to contribute to a provision of the Act a meaning foreign to the plain and unmistakable words in which it is couched. *Henry v. Leather Co.*, 477.

§ 40d. Whether Accident Arises in Course of Employment.

The death of Highway Patrolmen in a plane crash while attempting to locate and arrest a person accused of a crime of violence *is held* compensable under the Workmen's Compensation Act, since the Patrolmen had authority

to make the arrest and did not exceed their authority in using an airplane in their attempted discharge of their duties. *Galloway v. Dept. of Motor Vehicles*, 447.

Injuries sustained in an automobile accident by employees while on their way to or from their work in an automobile owned by one of them arises out of and in the course of their employment when, under the terms of the employment and as an incident to the contract of employment, allowances are made by the employer to cover the cost of such transportation. *Puett v. Bahnson Co.*, 711.

§ 40f. Diseases Compensable Under Workmen's Compensation Act.

Only those occupational diseases specifically designated by G.S. 97-53, as amended, are compensable under the Workmen's Compensation Act. *Henry v. Leather Co.*, 477.

A dermatitis resulting from contact with gloves made of commercial rubber is not an occupational disease compensable under the Workmen's Compensation Act. G.S. 97-53 (13). *Ibid.*

§ 41. Workmen's Compensation Act—Actions Against Third Person Tort-Feasor.

Where neither the employer nor its insurance carrier has brought action against the third person tort-feasor within six months from the date of the injury, the injured employee may maintain such action in her own name. *Jones v. Elevator Co.*, 285.

Neither the employer nor its insurance carrier are proper or necessary parties to an action instituted by the injured employee against the third person tort-feasor more than six months from the date of the injury, no action having been instituted by the employer or its insurance carrier. *Ibid.*

Decision that third person tort-feasor is not entitled to set up indemnity agreement as cross-action against employer in employee's action does not rule that indemnity agreements are invalid. *Eledge v. Light Co., Appendix*, 737.

§ 50. Burden of Proof in Proceedings Under Workmen's Compensation Act.

Claimant in a proceeding under the Workmen's Compensation Act has the burden of proving that his claim is compensable under the Act. *Henry v. Leather Co.*, 477.

§ 51. Proceedings Before Industrial Commission.

The Industrial Commission is the sole judge of the truthfulness and weight of the testimony of the witnesses in the discharge of its function as the fact finding authority under the Workmen's Compensation Act. *Henry v. Leather Co.*, 477.

§ 55d. Review of Award of Industrial Commission.

The findings of fact of the Industrial Commission are conclusive upon appeal when supported by competent evidence. *Henry v. Leather Co.*, 477.

On appeal from an award of the Industrial Commission the jurisdiction of the courts is limited to the questions of law as to whether there was competent evidence before the Commission to support its findings of fact and whether such findings justify the legal conclusions and decision of the Commission. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 57. Businesses Subject to Unemployment Taxes.

Where, prior to the purchase of the business by defendant, there had been employed therein more than eight individuals for twelve weeks during the calendar year, and defendant, after purchasing the business, employs more than eight employees for sixteen weeks during the remainder of the year, defendant is an employer required to pay contributions upon the wages of his employees under the provisions of the Employment Security Act. *Employment Security Com. v. Whitehurst*, 497.

§ 60. Right to Unemployment Compensation.

After strike, notice of suspension of operations and that employees might seek other employment is not discharge entitling employees to claim unemployment compensation. *Employment Security Com. v. Jarrell*, 381.

§ 61. Proceedings Before Employment Security Commission.

Where the employer resists recovery of unemployment compensation on the ground that claimants' unemployment was due to a work stoppage resulting from a labor dispute, each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under G.S. 96-14 (d). *Employment Security Com. v. Jarrell*, 381.

§ 62. Appeals From Employment Security Commission.

The findings of fact of the Employment Security Commission are conclusive when supported by evidence, and therefore review is limited to determining whether there was evidence before the Commission to support its findings and whether the facts found sustain its conclusions of law. *Employment Security Com. v. Jarrell*, 381.

MINES AND MINERALS.

§ 4b. Liability for Injuries to Lands From Operation of Mines.

G.S. 74-31 does not purport to relieve a mining company from liability for damages to lands resulting from the washing of tons of earth into a stream and the deposit of the sediment on plaintiff's land. *McKinney v. Deneen*, 540.

MORTGAGES.

§ 5. Execution, Acknowledgment and Probate.

The introduction in evidence by plaintiff of recorded deed of trust with recitals showing purported signatures of the trustors duly acknowledged, probated and recorded, raises the presumption of due execution, signing and delivery, and the testimony of the *feme* trustor that she did not sign the instrument, even though not contradicted by oral testimony, does not warrant a peremptory instruction in her favor, the matter being for the determination of the jury upon the evidence under appropriate instructions from the court. *Bank v. Sherrill*, 731.

§ 12. Registration, Lien and Priorities.

A purchase money deed of trust stands upon the same footing as a purchase money mortgage, and its lien is superior to the lien for material which was begun to be furnished the purchaser while he was in possession under a lease with option to purchase, since no lien against the purchaser could attach prior to the lien of the deed of trust, the execution of the deed and the deed of trust being regarded as but one transaction. *Supply Co. v. Rivenbark*, 213.

MORTGAGES—*Continued.*

§ 27. Payment and Satisfaction.

Burden is on mortgagors to prove payment when relied on by them. *Combs v. Porter*, 585.

§ 30b. Parties Who May Foreclose.

While the executor of a deceased mortgagee may exercise the power of sale in the mortgage, G.S. 45-4, where there are two executors of the deceased mortgagee the power must be exercised by them jointly. *Combs v. Porter*, 585.

§ 39c (5). Attack and Setting Aside.

Mortgagor's evidence of payment *held* sufficient to go to jury and support verdict in their favor. *Combs v. Porter*, 585.

MUNICIPAL CORPORATIONS.

§ 5. Powers and Functions in General: Legislative Control and Supervision.

A municipality is a creature of the State and has the powers prescribed by statute and those necessarily implied by law, and no others. G.S. 160-1. *Horner v. Chamber of Commerce*, 440.

§ 11½. Police Officers.

A person not a resident of an unincorporated municipality may not be elected chief of police by the board of commissioners of the municipality. G.S. 160-25. *Barlow v. Benfield*, 663.

§ 14a. Defects or Obstructions in Streets or Sidewalks.

Mere slipperiness of a sidewalk occasioned by smooth and level ice and snow, formed by nature, with evidence that the accident in suit occurred the second morning after a general precipitation, but without evidence that the condition at the place in question was so exceptional in nature as to demand prior or preferential attention, *is held* insufficient to be submitted to the jury on the question of the negligence of the city in failing to remove the ice and snow from the sidewalk. *Browder v. Winston-Salem*, 400.

Ordinance requiring property owners to remove snow from sidewalks in front of their properties is immaterial on question of city's negligence. *Ibid.*

§ 15b. Injuries From Operation of Municipal Sewerage System.

Landowner may sue city and corporation for concurrent acts in polluting stream above plaintiff's property. *Stowe v. Gastonia*, 157.

§ 41. Municipal Charges and Expenses.

A municipality may not appropriate tax revenue unless the outlay is explicitly or implicitly authorized by a constitutional statute. *Horner v. Chamber of Commerce*, 440.

No statute authorizes a city to use its tax revenues for the payment of expense incident to the ordinary activities of the Chamber of Commerce of the city. G.S. 158-1. *Ibid.*

NEGLIGENCE.

§ 1. Negligence in General.

As a general rule, negligence of one person will not be imputed to another unless the relationship of master and servant exists between them. *Townsend v. Coach Co.*, 81.

NEGLIGENCE—*Continued.*

§ 3. Dangerous Substances, Machinery and Instrumentalities.

The liability of a seller for resulting injuries when he authorizes an article to be used for a specified purpose, when by reason of defective construction, injury may be reasonably apprehended from such use, rests upon general principles of negligence and does not arise out of the contract. *Gas Co. v. Montgomery Ward & Co.*, 270.

While elevator is not inherently dangerous instrumentality, it becomes so unless kept in proper repair, and person injured as result of failure of safety device may sue party under continuing contractual duty to keep elevator in repair. *Jones v. Elevator Co.*, 285.

Gas is inherently dangerous substance requiring commensurate degree of care. *Graham v. Gas Co.*, 680.

§ 4e. Obstructions and Dangerous Conditions of Lands.

Evidence *held* insufficient to show negligence on part of building owner in regard to snow and ice on sidewalk. *Browder v. Winston-Salem*, 400.

§ 4f (1). Distinction Between Invitees, Licensees and Trespassers.

Evidence that a patron at a hotel went to the manager's desk, which was in a corner of the hotel lobby, in continuing attempts to get into communication with a friend she expected to meet her at the hotel for dinner, and received information from the manager as to a phone call previously made by the friend and obtained change from the manager for use in another telephone call, *is held* to show that the patron was an invitee. *Coston v. Hotel*, 546.

§ 4f (2). Liability of Proprietor for Injury to Customer or Patron.

Nonsuit *held* properly entered in an action by a customer to recover for the burning of his coat which caught fire as he passed a red hot stove in defendant's place of business. *Foy v. Electric Co.*, 161.

Res ipsa loquitur held applicable to collapse of chairs under exclusive control of store proprietor. *Schueler v. Good Friend Corp.*, 416.

Plaintiff's action was based upon the negligence of defendant theatre in failing to properly light aisles in its balcony. Plaintiff's evidence tended to show that she voluntarily went to the balcony of the theatre, which she had visited before, and in going to her seat on the rear row of seats, stepped up the six inch elevation from the aisle to the floor upon which the seats were fastened, but that in leaving the theatre after the show, and after passing seats near the aisle which she saw to be vacant, she fell when she attempted to step into the aisle because there was insufficient light for her to see the difference in the floor levels. *Held:* Plaintiff's own evidence discloses contributory negligence constituting a proximate cause of her injury, and defendants' motion to nonsuit should have been allowed. *Gordon v. Sprott*, 472.

Evidence that plaintiff, a patron in a hotel, was an invitee at the time and place in question, and tripped over a wire extending along the floor, and fell to her injury, *is held* sufficient to overrule nonsuit in her action against the hotel to recover for her resulting injury. *Coston v. Hotel*, 546.

The owner owes the duty to an invitee to keep the premises in reasonably safe condition for use by the invitee, which means to exercise the care of a reasonably prudent man to keep the premises safe. *Ibid.*

NEGLIGENCE—*Continued.*

§ 4f (3). Duty of Owner of Lands to Licensee.

The owner owes the duty to a licensee to refrain from willful or wanton negligence and to refrain from doing any act which increases the hazard to the licensee while on the premises, and passive negligence on the part of the owner will not ordinarily give rise to liability. *Coston v. Hotel*, 546.

§ 7. Intervening Negligence.

Insulating negligence relates to proximate cause, and is an intervening act which could not have been reasonably foreseen and which becomes the efficient cause of the injury, and thus breaks the causal connection of the primary negligence. *Gas Co. v. Montgomery Ward & Co.*, 270.

The doctrine of insulating negligence is merely an application of the definition of proximate cause. *Whiteman v. Transportation Co.*, 701.

§ 11. Contributory Negligence in General. (Nonsuit on ground of, see hereunder § 19c.)

It is not necessary that contributory negligence be the sole proximate cause in order to bar recovery by plaintiff, it being sufficient if it is one of the proximate causes of the injury. *Fawley v. Bobo*, 203; *Gordon v. Sprott*, 472; *Moore v. Boone*, 494.

§ 15. Parties in Negligence Actions.

Person injured in fall down elevator shaft may sue person who was under continuing contractual obligation to keep elevator in repair. *Jones v. Elevator Co.*, 285.

§ 16. Pleadings in Negligence Actions.

A demurrer should be sustained only if there is a statement of a defective cause of action; if there is a defective statement of a good cause of action, the remedy is by motion to make the complaint more definite, G.S. 1-153, or the court may allow an amendment. G.S. 1-129. This rule applies to negligence cases. *Davis v. Rhodes*, 71.

Allegations to the effect that defendant employee was driving the truck of defendant employer in the regular course of his business, that the employee approached from the rear and "unlawfully, wrongfully, recklessly and negligently" struck and collided with the motor scooter on which plaintiff's intestate was riding, thereby causing the death of intestate, *is held* to constitute a defective statement of a good cause of action, cured by an amendment particularizing the acts of negligence relied on. *Ibid.*

In negligent injury actions, demurrer on the ground of contributory negligence should not be sustained unless such negligence appear patently and unquestionably upon the face of the complaint. *Hollingsworth v. Grier*, 108.

It is not necessary that defendant plead "contributory negligence" *eo nomine*, it being sufficient if he pleads as a bar to plaintiff's cause facts and circumstances which amount to contributory negligence. *Fawley v. Bobo*, 203.

§ 17. Burden of Proof in Negligence Actions.

Burden of proof on defenses of assumption of risks and contributory negligence is on defendant. *Bruce v. Flying Service*, 181.

NEGLIGENCE—*Continued.*

§ 19b (2). Sufficiency of Evidence—Res Ipsa Loquitur.

Evidence that plaintiff, a patron in a store, was invited to sit on one of a tier of four chairs attached together, that the chairs were of peculiar construction and unbalanced unless secured to the floor, and that when plaintiff sat down on one of the chairs and turned to deposit her purse in the next chair, the whole tier of chairs fell over backward, resulting in serious injury to plaintiff, *is held* sufficient to be submitted to the jury under the doctrine of *res ipsa loquitur*, since the chairs were under the exclusive control of defendant and such an accident presumably would not have occurred if due care had been exercised. *Schueler v. Good Friend Corp.*, 416.

§ 19c. Nonsuit on Ground of Contributory Negligence.

Assumption of risk and contributory negligence are affirmative defenses upon which defendant has the burden of proof, and in order for defendant to be entitled to nonsuit thereon they must be so plainly established by the evidence that a reasonable man could draw no other inference. *Bruce v. Flying Service*, 181.

Nonsuit on the ground of contributory negligence will not be granted if it is necessary to rely either in whole or in part on defendant's evidence. *Bailey v. Michael*, 404.

Nonsuit on the ground of contributory negligence will not be granted unless plaintiff's own evidence, taken in the light most favorable to him, establishes contributory negligence as a sole reasonable inference or conclusion that can be drawn therefrom, and nonsuit on this ground can never be allowed when the evidence as to the controlling and pertinent facts is conflicting. *Ibid.*

While contributory negligence is an affirmative defense upon which defendant has the burden of proof, nonsuit on the ground of contributory negligence is properly entered when plaintiff's own evidence establishes contributory negligence as the sole reasonable inference that can be drawn therefrom. *Howard v. Bingham*, 420.

Plaintiff's evidence *held* to show contributory negligence as matter of law barring recovery for fall in theatre aisle. *Gordon v. Sprott*, 472.

§ 20. Instructions in Negligence Actions.

Exception to the failure of the court to give specific instructions on the doctrine of insulating negligence will not be held for error when the rights of the parties upon the evidence in the case are fully presented and explained in the instructions upon the question of proximate cause. *Whiteman v. Transportation Co.*, 701.

NUISANCES.

§ 1. Definition and Acts and Conditions Constituting Nuisances.

An airport is a lawful enterprise and is not a nuisance *per se*, but may become a nuisance if its location, structure and manner of use and operation result in depriving complainant of the comfort and enjoyment of his property. *Barrier v. Troutman*, 47.

§§ 4, 5. Suit to Abate and Actions for Damages.

The ancient writ of nuisance has been superseded under the code by civil action for damages or for a removal of the nuisance, or for both. G.S. 1-539. *Barrier v. Troutman*, 47.

NUISANCES—*Continued.*

The injured party is entitled to restrain the operation of a business or enterprise, even though lawful, when he makes it appear that in its manner of operation it constitutes a private nuisance, but interference by the court should not extend beyond that which is necessary to correct the evil and prevent the injury. *Ibid.*

Abatement of a private nuisance is not dependent upon recovery of damages. *Ibid.*

An individual may not maintain an action for a public nuisance unless he shows unusual and special damage, different from that suffered by the general public. *Ibid.*

Plaintiff alleged that by reason of the topography and the manner of its use and operation, planes using the airport on adjoining property flew over plaintiff's clinic at a height of not more than 100 feet, so as to constitute a recurrent danger and disturbance to plaintiff and patients of his clinic. *Held:* The complaint alleges a private nuisance, and upon verdict of the jury that the airport constituted a nuisance as alleged in the complaint, plaintiff is entitled to enjoin such use notwithstanding the further finding of the jury that plaintiff had not been damaged in a special and peculiar way. *Ibid.*

Landowner may sue municipality and corporation for damages resulting from concurrent acts in polluting stream so as to constitute nuisance. *Stowe v. Gastonia*, 157.

PARENT AND CHILD.

§ 2. Proof of Relationship and Presumption of Paternity.

In a prosecution of defendant for willful failure to support his illegitimate child conceived during wedlock of the mother, the mother, while not competent to testify as to the nonaccess of her husband, is competent to testify as to acts of illicit intercourse of defendant, that he was the father of the child in question, and had admitted paternity and promised to provide for the child and had failed to do so after demand. *S. v. Bowman*, 51.

§ 3b. Liability of Parent for Injuries to Child.

In an action in tort by an infant against a corporation, allegations of the answer setting up the defense that the infant's parents were majority stockholders in the corporation and that to the extent of such stock ownership the action was in tort by an infant against its parents, *held* properly stricken on motion aptly made under authority of *Wright v. Wright*, 229 N.C. 503. *Foy v. Electric Co.*, 161.

§ 3c. Liability of Third Person to Child for Disruption of Family Relationship.

Children may not maintain an action against a third person for criminal conversation and alienation of the affections of their mother. There is neither common law nor statutory basis for such action, and the problem is sociological rather than legal. *Henson v. Thomas*, 173.

§ 4a. Proceedings to Obtain Custody From Person Other Than Spouse.

Under the 1949 amendment to G.S. 50-13 (Ch. 1010, Session Laws of 1949) either parent may institute a special proceeding to obtain custody of his or her child in cases not theretofore provided for by this statute or G.S. 17-39, and this amendment authorizes a special proceeding by the mother of an illegiti-

PARENT AND CHILD—*Continued.*

mate child to obtain its custody from aunt, with whom she had left the child, and thus restricts the jurisdiction of the Juvenile Court in such instances, G.S. 110-21, *et seq.* *In re Cranford*, 91.

A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. G.S. 7-58; G.S. 7-65. *Ibid.*

Where the mother of an illegitimate child takes it with her to live with her aunt, and upon her subsequent marriage to a person not the father of the child, leaves the child with her aunt, *held:* the mother is entitled to regain custody of the child from the aunt in proceedings instituted for this purpose upon the court's finding that the mother is a woman of good character and has a home proper and fit for the child to visit, notwithstanding that the aunt may be able to provide a more advantageous environment, the natural right of the mother to the custody of the child being paramount in the absence of a showing of unfitness. *Ibid.*

§ 9. Abandonment of Child.

The acts of a mother of an illegitimate child in taking the child with her to live with her aunt and in leaving the child with her aunt upon her subsequent marriage to a person other than the father of the child, even though done with an accompanying statement that she waived right to further claim, *is held* not an abandonment of the child in law. *In re Cranford*, 91.

Where defendant sets up defense of illegitimacy, court may submit written issues relating to this defense and guilt or innocence of defendant. *S. v. Stone*, 324.

A warrant charging defendant with willfully neglecting to provide adequate support for his wife and two children is sufficient to express the charge against defendant and to apprise him of its nature, and defendant's motion in arrest of judgment on the ground that it omitted to charge that he had begotten the children, is properly denied, the question of paternity having been raised and submitted to the jury upon the conflicting evidence. *Ibid.*

PARTITION.

§ 5d. Proceedings Upon Plea of Sole Seizin—Sufficiency of Evidence and Nonsuit.

Defendants in partition who plead sole seizin are not entitled to nonsuit on the ground that plaintiff had introduced in evidence deed conveying the property to them, since the introduction of the deed admits its execution, but not necessarily the truth of its recitals or its legal effect. In the present case plaintiff claimed as an heir-at-law, and the deed introduced in evidence recited that the grantors therein derived title as heirs of the same ancestor, and supported plaintiff's contention that he had not conveyed his interest in the land. *McDowell v. Staley*, 65.

PARTNERSHIP.

§ 1a. Creation and Existence of Relationship.

The fact that lessor is to receive as rent a percentage of the proceeds or net profits of the business, does not constitute lessor a partner therein. *Perkins v. Langdon*, 386.

PLEADINGS.

§ 3a. Complaint—Statement of Cause of Action in General.

A statement of a defective cause of action is one in which there is a defect which goes to the substance of the cause of action and not merely to its form of statment; a defective statement of a good cause of action is one in which an enforceable cause of action is stated, but is stated inartificially or without sufficient clearness, or definiteness or particularity. *Davis v. Rhodes*, 71.

§ 5. Complaint—Prayer for Relief.

Plaintiff will be granted that relief to which the facts alleged and proved entitle him even though there be no formal prayer for relief corresponding with the allegations, and even though relief of another kind may be demanded. *McCampbell v. Building & Loan Asso.*, 647.

§ 6. Time, Requisites and Sufficiency of Filing of Answer. (Judgments by default, see Judgments.)

A pleading is "filed" when it is delivered for that purpose to the proper officer and received by him, and upon plaintiff's admission that answer had been filed, it will be presumed that copy thereof for the use of plaintiff had likewise been filed and mailed to him or his attorney of record, as required by statute. G.S. 1-125. *Bailey v. Davis*, 86.

Upon appeal from the denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record, the Superior Court acquires jurisdiction of the entire cause, G.S. 1-276, and has the power to permit the answer to remain of record, even though it was filed after time for answering had expired. G.S. 1-152. *Ibid.*

§ 7. Answer—Defenses in General, Form and Contents.

Defendants may interpose varying and contradictory defenses. *Light Co. v. Bowman*, 332.

§ 15. Office and Effect of Demurrer.

A demurrer tests the legal sufficiency of the pleading demurred to, admitting for the purpose the truth of all matters and things alleged therein. *Canestrino v. Powell*, 190; *McCampbell v. Building & Loan Asso.*, 647.

The complaint will be liberally construed upon demurrer, and the demurrer should be overruled if the complaint presents facts sufficient to constitute a cause of action or if such facts can be fairly gathered from it, however inartificially the pleadings may be drawn. *Horner v. Chamber of Commerce*, 440.

The facts alleged in the pleading will be taken as true upon demurrer. *Penn v. Coastal Corp.*, 481.

A pleading must be fatally defective before it will be rejected as insufficient. *McCampbell v. Building & Loan Asso.*, 647; *Moore v. Ins. Co.*, 729.

A demurrer to a single paragraph of the complaint on the theory that such paragraph attempts to set up a second, separate cause of action and fails to state facts sufficient for that purpose, is improvidently granted when the pleading considered as a whole sufficiently states but a single cause of action and the paragraph objected to merely sets forth additional elements of damage, defendant's proper procedure to test plaintiff's right to recover such additional elements of damage being by objection to evidence offered in support thereof. *Moore v. Ins. Co.*, 729.

PLEADINGS—*Continued.*

§ 17. "Speaking" Demurrers.

A motion to dismiss on the ground of the pendency of a prior action between the parties cannot be treated as a demurrer when this fact does not appear upon the face of the complaint, since in such instance a demurrer would be bad as a speaking demurrer. *Reece v. Reece*, 321.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

In a suit against the owner of the store in which plaintiff was injured and the carrier of liability insurance for the owner, demurrer for misjoinder of parties and causes is improperly granted when the complaint fails to state a cause of action against insurer, and the cause will be remanded to the end that it be dismissed as to the insurer and retained for trial against the store owner, after granting plaintiff time in which to replead. *Jordan v. Maynard*, 101.

In suit against city and corporation for joint and concurrent acts in polluting stream above plaintiff's land, demurrer for misjoinder of parties and causes was properly overruled. *Stowe v. Gastonia*, 157.

§ 19c. Demurrer for Failure of Complaint to State Cause of Action.

Demurrer will lie when there is a statement of defective cause of action, but not if there is a defective statement of good cause of action. *Davis v. Rhodes*, 71.

The service of an amendment to the original complaint, even though an additional summons is issued and served therewith inadvertently, does not constitute a new action, and demurrer on the ground that the amendment, in itself, fails to state a cause of action, is properly denied, the original complaint as amended being sufficient. *Bumgarner v. Bumgarner*, 600.

The rule that a pleading will be liberally construed upon demurrer and the pleader given the benefit of all facts that can be implied by fair and reasonable intendment from the facts expressly stated, cannot be invoked to supply an essential fact by inference when the facts specifically averred permit the deduction of an opposite inference. *Steele v. Cotton Mills*, 637.

§ 20. Time of Demurring and Waiver.

Right to demur where the complaint contains a defective statement of a good cause of action is waived by filing answer, but demurrer to a statement of a defective cause of action is not waived by answer, but may be made at any time before final judgment. *Davis v. Rhodes*, 71.

§ 20½. Form and Effect of Judgment Upon Demurrer.

Adjudication that plaintiff had failed to state cause of action against one defendant as joint tort-feasor does not preclude other defendant from asserting cross-action for contribution. *Canestrino v. Powell*, 190.

§ 22b. Amendment by Permission of Trial Court.

If there is a defective statement of good cause of action, the court may allow an amendment. *Davis v. Rhodes*, 71.

The trial court has discretionary power to permit defendant to amend the answer and plead estoppel arising upon plaintiff's admissions on the trial. *Allen v. Costner*, 340.

PLEADINGS—*Continued.*

While wide latitude is given the trial court to permit amendment to the pleading to conform to the evidence, even after verdict, the allowance of an amendment after verdict in substantial disagreement with the evidence must be held for error. *Casstevens v. Casstevens*, 572.

§ 23. Amendment After Decision on Appeal.

The trial court has discretionary power to allow a party to amend his pleading after certification of the decision of the Supreme Court on appeal, to allege facts relied on as an estoppel, and the exercise of such discretion is not subject to review except for palpable abuse. *Light Co. v. Bowman*, 332.

Where the Supreme Court sustains demurrer *ore tenus* upon appeal, plaintiffs may apply for leave to amend their pleadings. *Perkins v. Langdon*, 386.

§ 26. Motions to Make Complaint More Definite.

Where there is a defective statement of a good cause of action, the remedy is by motion to make the complaint more definite. *Davis v. Rhodes*, 71.

§ 29. Motions and Rendition of Judgment on Pleadings.

Where the clerk renders judgment on the pleadings upon the filing of answer admitting the allegations of the complaint entitling plaintiff to the recovery, and such judgment is affirmed on appeal to the Superior Court, the matter will not be disturbed on further appeal to the Supreme Court, since the Superior Court had jurisdiction to enter the judgment. *Finance Co. v. Luck*, 110.

PRINCIPAL AND AGENT.

§ 2. Creation and Existence of Relationship.

The relationship of principal and agent must be created by mutual agreement and cannot be created by one party *in invitum*. *Johnson v. Orrell*, 197.

§ 7f. Special Agents.

Party dealing with special agent is under duty to ascertain extent of agent's authority. *Iselin & Co. v. Saunders*, 642.

§ 13d. Sufficiency of Evidence of Agency in Actions by Third Person Against Principal.

Evidence *held* sufficient for jury on question of whether pilot was agent of flying service in piloting plane in air show. *Bruce v. Flying Service*, 181.

PROCESS.

§ 5a. Service in General.

Service on an individual as an officer of a nonexistent corporation is not service on the individual as a partner of a firm trading under a name materially different from the designated corporate name, there being no motion to amend the process. *Electric Membership Corp. v. Grannis Bros.*, 716.

§ 14. Amendment and Correction of Process.

Process may be amended to correct a mere misnomer, in which instance it is not considered a substitution of new parties, but a correction of the description of the party actually served. *Electric Membership Corp. v. Grannis Bros.*, 716.

PROCESS—*Continued.*

As a general rule, where a partnership has been designated in the process as a corporation, and a member of the firm has been served with summons, th members of the partnership may be substituted by amending the process and allowing the pleadings to be amended, but this rule is not applicable when the corporation as designated is not the firm name of the partnership. *Ibid.*

PROPERTY.

§ 3. Prosecutions for Malicious Destruction of Property.

Proof of the destruction of a fence erected upon land is insufficient to sustain a conviction upon an indictment charging wanton and willful injury to personal property, since a fence is a part of the realty and there is a fatal variance between allegation and proof. G.S. 14-160. *S. v. Baker*, 136.

PUBLIC OFFICERS.

§ 1. Officers Who Are Public Officers.

The office of chief of police of an unincorporated town is a public office. *Barlow v. Benfield*, 663.

§ 2. Appointment or Election by Boards or Commissioners.

Election of tax manager for Madison County under local law. *Roberts v. McDevitt*, 458.

Tie in vote of electors results in no election. *Ibid.*

Where commissioners fail to elect judge of special court, mayor constituting the special court is at least *de facto* judge. *In re Wingler*, 560.

Municipal commissioners may not elect nonresident chief of police. *Barlow v. Benfield*, 663.

§ 5a. De Facto Officers.

A *de facto* judge is one who assumes to be the judge of a court established by law, has possession of the judicial office in question and discharges its duties, and has a fair color of right or title to the judicial office or has acted as its occupant for so long a time and under such circumstances of reputation and acquiescence by the public generally as to give rise to the supposition that he is the judge he assumes to be, but whose incumbency is illegal in some respect. *In re Wingler*, 560.

§ 5b. De Jure Officers.

A *de jure* judge is one who possesses the legal qualifications for the judicial office in question, has been lawfully chosen, and has qualified himself to perform the duties of such office according to the mode prescribed by law. *In re Wingler*, 560.

§ 5c. Usurpers.

A usurper is one who undertakes to act officially without any actual or apparent authority. *In re Wingler*, 560.

§ 7a. Liability for Acts Done in Discharge of Duties in General.

A public officer is immune from prosecution for his acts done pursuant to official regulations provided the regulations are within statutory authority,

PUBLIC OFFICERS—*Continued.*

and the acts are not unreasonable in the manner and extent of the application of the regulations. *S. v. Carpenter*, 229.

§ 9. Attack of Validity of Official Acts.

Where the validity of an act of a person acting in a judicial office is collaterally attacked, the court may inquire into his right to the judicial office only so far as to determine whether he is a usurper on the one hand or a *de jure* or *de facto* officer on the other, since if he be a *de facto* officer his acts are binding on the public generally, G.S. 128-6, and are not subject to collateral attack, but may be questioned only in a direct proceeding brought against him for that purpose by the Attorney-General in the name of the State, G.S. 1, Article 41, while if he be a usurper his acts are absolutely void and can be impeached at any time in any proceeding. *In re Wingler*, 560.

Sentence imposed by mayor acting as special court cannot be attacked in *habeas corpus*, the mayor being at least a *de facto* judge. *Ibid.*

Where a person who has been recognized by officials and the public generally as the chairman of a county board and who has discharged the duties of his office in such capacity without question, his authority to exercise his statutory power to vote *ex officio* as an elector in the election of another county official cannot be collaterally attacked in an action contesting election of such other county official. *Roberts v. McDevitt*, 458.

RAPE.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence in this case of defendant's guilt of the capital offense of rape, *held* sufficient to overrule defendant's motion to nonsuit. *S. v. Speller*, 549.

§ 5. Instructions in Rape Prosecutions.

Where in a prosecution for rape, the court calls to the jury's attention the fact that it might recommend imprisonment for life, Chap. 299, Session Laws 1949, an exception to the charge on the ground that the court failed to properly call this matter to the attention of the jury is feckless. *S. v. Speller*, 549.

RECEIVERS.

§ 12c. Liens and Priorities.

Employees under a contract providing for paid vacations have a lien against the receiver of the employer for ⅙ of their vacation pay, since this amount was earned during the two months next preceeding the institution of insolvency proceedings. *In re Publishing Co.*, 395.

Employees under a contract providing for severance pay are not entitled to a lien for such pay against the receiver, since severance pay is not wages earned. *Ibid.*

REFERENCE.

§ 3. Compulsory Reference.

Where the verdict of the jury establishes that plaintiff is entitled to commissions on the gross receipts of defendant store and a bonus on the increase of the total gross receipts over those of the same period of the preceding year, as extra compensation under his contract of employment, the ascertainment of the amount requires an examination of a long account, and the court

REFERENCE—*Continued.*

is empowered to order a compulsory reference to determine such amount. *Parker v. Helms*, 334.

Appeal from order of compulsory reference is premature. *Parker v. Helms*, 334.

The court has discretionary power to grant or refuse a reference in those cases coming within the compulsory reference statute, and while movant has the right to insist that the judge exercise his discretionary power and act on the motion, he has no legal right to demand that the court direct a reference. *Veazey v. Durham*, 354.

No appeal lies from discretionary refusal to order compulsory reference. *Veazey v. Durham*, 354; *Veavey v. Durham*, 357.

§ 10. Duties and Powers of Court in Reviewing Report.

Where the trial court, in passing upon exceptions to the referee's report, summarily enters judgment overruling all of the exceptions and confirming the report in its entirety because there was evidence to support each of the findings of fact of the referee, the cause must be remanded, since the law contemplates that the court consider and deliberately weigh the evidence adduced before the referee and make his own independent determination of the facts in passing upon the exceptions. *Macon v. Murray*, 61.

§ 14d. Trial Upon Exceptions—Competency of Proceedings Before Referee.

The findings of fact and conclusions of law of the referee are not competent as evidence in the trial of the issue raised by exceptions to the report. G.S. 1-189. *Cherry v. Andrews*, 261.

ROBBERY.

§ 1b. Robbery With Firearms.

G.S. 14-87 does not divide robbery into separate offenses but merely provides a more severe punishment if the offense of common law robbery is committed or attempted with the use or threatened use of firearms or other dangerous weapons. *S. v. Chase*, 589.

§ 3. Prosecution and Punishment.

An instruction to the effect that defendant might be convicted of common law robbery even though the taking was without felonious intent, must be held for prejudicial error. *S. v. Chase*, 589.

SALES.

§ 2. Requisites and Validity—Agreement.

Where a partner gives a provisional order for goods, conditioned upon approval of his copartners, and, upon refusal of his copartners to approve, gives immediate notice of such disapproval, there is no contract to purchase the goods, and it is immaterial whether the offerer was an independent dealer or a selling agent. *Iselin & Co. v. Saunders*, 642.

Where an agreement is made with an independent dealer to purchase goods, and the dealer turns the order over to another company, the purchaser is at liberty to refuse to accept the goods, since a person has the right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. *Ibid.*

SALES—*Continued.*

Where the purchaser constitutes another his special agent for the purchase of a limited quantity of goods, and the agent places the order for double the quantity specified, the purchaser is at liberty to reject the quantity of goods delivered in excess of the quantity specified, since a party dealing with a special agent is under duty to acquaint himself with the extent of the agent's authority. *Ibid.*

§ 16. Warranties in Sale by Sample.

Upon sale by sample there is an implied warranty that the bulk of the goods will correspond with the sample in kind and quality, and the purchaser is entitled to reject goods upon breach of such warranty. *Iselin & Co. v. Saunders*, 642.

§ 20. Actions and Counterclaims for Purchase Price.

Plaintiff was the assignee of an account for the purchase price of goods. *Held:* An instruction to the effect that plaintiff was entitled to recover the purchase price if the jury should find from the greater weight of the evidence that plaintiff purchased the account in good faith for valuable consideration before maturity, must be held for error, since plaintiff nevertheless took the nonnegotiable chose in action subject to all defenses which the debtor may have had against the assignor prior to the debtor's knowledge of the assignment, there being sufficient allegation and evidence in the action of such defenses. *Iselin & Co. v. Saunders*, 642.

§ 17. Parties Liable—Manufacturer, Wholesaler, Retailer.

The seller of an article manufactured for it by another is subject to the same liability as the maker if the article has been rendered potentially dangerous by defect in the construction of safety devices. *Gas Co. v. Montgomery Ward & Co.*, 270.

§ 30. Actions for Damages Due to Defects.

The liability of a seller for resulting injuries when he authorizes an article to be used for a specified purpose, when by reason of defective construction injury may be reasonably apprehended from such use, rests upon general principles of negligence and does not arise out of the contract. *Gas Co. v. Montgomery Ward & Co.*, 270.

Evidence that seller represented that article was safe for use in particular manner when consciously ignorant of defect, held to raise implication of negligence. *Ibid.*

The evidence tended to show that a service man, upon being called to service a heater after the pilot light had gone out, struck a match after being warned not to do so, causing the gas, which had escaped because of a defect in the automatic cut-off valve, to explode. *Held:* The palpable negligence of the serviceman could not have been reasonably foreseen by the seller, and therefore his acts constitute intervening negligence insulating as a matter of law any negligence on the part of the seller in representing that the heater was safe for such use when it was consciously ignorant of the defective condition. *Ibid.*

SCHOOLS.

§ 6a. Selection of School Sites.

Where the County Board of Education selects a site for an elementary school contiguous to its high school site, it may condemn for such elementary

SCHOOLS—*Continued.*

school site lands not in excess of ten acres, G.S. 115-85, since the Board has the discretionary power to locate the schools on adjoining sites and the statute does not have the effect of limiting the acreage of both schools to ten acres. *Board of Education v. Lewis*, 661.

The right and duty to select school sites is vested in the sound discretion of the local school authorities, and the courts will not restrain or otherwise interfere with the selection of such sites unless it is made to appear that the local authorities have violated some provision of law or there has been a manifest abuse of discretion on their part. *Ibid.*

STATUTES.

§ 1c. Constitutional Requirements and Restrictions in Enactment—Private or Special Act.

Prescription against establishment of court by private act is not retroactive. *In re Wingler*, 561.

§ 5a. General Rules of Construction.

A statute in derogation of the common law must be strictly construed. *McKinney v. Deneen*, 540.

§ 12. Repeal by Enactment.

The action of the General Assembly in adopting a recodification in which a previous statute is deleted and not brought forward constitutes a repeal of the omitted statute. *King v. Gates*, 537.

TAXATION.

§ 2. Limitation on Tax Rate: Special and General Purposes.

A purpose which involves a regularly recurring expenditure in the performance of a duty or the exercise of a power which is essential to government and which has been delegated to the county unit of government, is a general rather than a special purpose within the meaning of Art. V, sec. 6, of the Constitution of N. C. *R. R. v. Mecklenburg County*, 148.

Expenditures by a county for maintenance of a rural police force is for a continuing expense in furtherance of an indispensable function of county government, and therefore is for a general county purpose within the meaning of the constitutional limitation on the tax rate for such purposes. *Ibid.*

§ 5. Public Purpose.

The construction, maintenance, and operation of a public hospital by a county is a public purpose for which funds may be provided by taxation, Art. V, Section 3, of the Constitution of N. C., and bonds for this purpose may be issued upon approval of the qualified voters of the county. *Hospital v. Comrs. of Durham*, 604.

§ 6. Lending Credit of State or Political Subdivisions to Person, Firm or Private Corporation.

Tax revenues may not be used for the supply of individuals or private corporations, however benevolent they may be. *Horner v. Chamber of Commerce*, 440.

TAXATION—*Continued.*

§ 11. Requisites of Bond Issue and Resolution and Allocation of Funds.

Where the resolution of the County Commissioners in submitting to a vote the question of issuing bonds for a public hospital uses the word "buildings," and it is later found that a surplus will remain after the erection and equipment of the main hospital building, such surplus may be used for the purpose of erecting on the hospital grounds a home for nurses, technicians and others engaged in essential employment incidental to the proper operation of the hospital. *Worley v. Johnston County*, 592.

§ 26½. Listing and Assessment of Real Property.

An act which permits the governing board of a town to list, value and revalue all property within its limits separately and independently of the general statute (G.S. 105-333) without providing for notice and hearing as to such valuations, and without setting up precise standards for evaluation, contravenes due process of law and is unconstitutional. *Bowie v. West Jefferson*, 408.

§ 38a. Actions by Taxpayer to Recover for Municipality an Illegal Expenditure.

Allegation in taxpayer's suit that expenditure was "purported" to have been made under provision of statute is not an allegation that city had statutory authority for expenditure. *Horner v. Chamber of Commerce*, 440.

No statute authorizes a city to use tax revenues for payment of expense incident to ordinary activities of its Chamber of Commerce. *Horner v. Chamber of Commerce*, 440.

§ 40b. Foreclosure of Certificates, Notice and Parties.

The provision of G.S. 105-391 (e) permitting that persons who have disappeared, who cannot be located, or whose names and whereabouts are unknown, to be served by publication under a fictitious name or by designation as heirs and assigns, is protective in nature and may not be used as a subterfuge to excuse failure to serve process on those whose names can be discovered by the exercise of due diligence. *Wilmington v. Merrick*, 297.

§ 40c. Foreclosure of Tax Liens.

In an action to foreclose a tax lien under G.S. 105-414, persons having an interest in the equity of redemption must be made parties by name, G.S. 105-391 (e) not being applicable, and judgment rendered in such proceeding is void as to persons having such interest who are not made parties. *Wilmington v. Merrick*, 297.

§ 42. Attack of Sale and Tax Titles.

The contention that judgment foreclosing a tax lien should not be vacated on motion of persons owning the equity of redemption who had not been made parties and served with process, because it would cast doubt upon other tax titles, is untenable, since it will not be assumed that other proceedings were irregular, but even so, a landowner may not be deprived of his property without due process of law. *Wilmington v. Merrick*, 297.

TORTS.

§ 1. Definition and Essentials.

The execution of a legal right cannot become illegal merely because its execution is prompted by a mischievous motive. *Lodge v. Benevolent Asso.*, 522.

TORTS—*Continued.*

§ 5. Liability of Tort-Feasor to Person Injured.

Where plaintiff demands no relief from party joined by original defendants for purpose of contribution, action does not involve liability of such defendant to plaintiff, and plaintiff may thereafter sue party so joined. *Powell v. Ingram*, 427.

One tort-feasor may not complain of nonsuit allowed its codefendant for failure of plaintiff's evidence to establish negligence on the part of such codefendant, when the question of its right to contribution against its codefendant is preserved by the admission of its evidence in regard thereto and the submission of the issue to the jury. *Whiteman v. Transportation Co.*, 701.

§ 6. Right to Contribution Among Joint Tort-Feasors and Joinder of Parties.

Adjudication that plaintiff had failed to state cause against one defendant as joint tort-feasor does not preclude other defendant from asserting cross-action for contribution. *Canestrino v. Powell*, 190.

Plaintiff instituted action against an individual defendant and receivers of a corporation as joint tort-feasors. The receivers' demurrer on the ground that the complaint failed to state a cause of action against them was sustained and plaintiff did not amend or appeal. The individual defendant then filed a cross-action against the receivers for contribution, G.S. 1-240. Thereafter the individual defendant had a corporation joined as a defendant upon allegations that the corporation, in purchasing the assets from the receivers, assumed all liabilities of the receivers in connection with their operation of the business. *Held:* The cross-action states a cause of action against the corporation in behalf of the individual defendant as a third party beneficiary under the contract, and the corporation's demurrer to the cross-action was properly overruled. Whether the individual defendant was entitled to the joinder of the corporation as a party defendant in the action as constituted is not presented or decided. *Ibid.*

Where plaintiff alleges that the negligence of defendant was the proximate cause or one of the proximate causes of her injury, such defendant may not maintain that another party is necessary to be joined on its contention that the negligence of such other party contributed to the injury, since even so, plaintiff would be entitled to sue either joint tort-feasor separately. *Jones v. Elevator Co.*, 285.

TRESPASS.

§ 6. Damages, Verdict and Judgment.

Permanent damages may not be recovered except by consent of parties for injury to lower lands caused by defendant's wrongful division of surface waters on his upper lands, but the damages should be limited to those sustained up to the time of action, the cause of the damage being subject to removal. *Phillips v. Chesson*, 566.

§ 9. Nature and Elements of Offenses of Criminal Trespass.

The three types of criminal trespass are (1) those designed to punish offenses against the freehold rather than the possession, (2) those designed to protect actual possession only, and (3) those designed to protect possession regardless whether it be actual or constructive. Actual possession consists in exercising acts of dominion over the land; constructive possession is theoretical possession arising from the existence of title which gives the right to assume immediate actual possession. *S. v. Baker*, 136.

TRESPASS—*Continued.*

G.S. 14-134 is designed to protect possession regardless whether it be actual or constructive. *Ibid.*

In a prosecution under G.S. 14-134 the State must show (1) that the land was in the actual or constructive possession of prosecutor, (2) that defendant entered upon the land intentionally, and (3) that accused did so after being forbidden by the prosecutor. *Ibid.*

In a prosecution under G.S. 14-134, even though the State establish that defendant intentionally entered upon land in the actual or constructive possession of prosecutor after being forbidden to do so by the prosecutor, and thus established as an ultimate fact that defendant entered the *locus in quo* without legal right, defendant may still escape conviction by showing as an affirmative defense that he entered under a *bona fide* claim of right, *i.e.*, that he believed he had a right to enter, and that he had reasonable grounds for such belief. *Ibid.*

§ 10. Prosecutions for Criminal Trespass.

Where, in a prosecution under G.S. 14-134 the only evidence offered by the State as to title of prosecutor is oral testimony that prosecutor had purchased the property, and the only evidence of possession was that prosecutor had warned defendant to stay off the land and had entered upon the land temporarily on a single occasion to erect a barbed wire fence thereon, *held*, defendant's motion to nonsuit should have been granted, since the evidence is insufficient to establish prosecutor's possession of the land within the meaning of the statute. *S. v. Baker*, 136.

TRIAL.

§ 4. Continuance.

Defendant's motion for a continuance on the ground that it had moved to strike certain allegations of the complaint as a matter of right and intended to demur to the complaint, but could not do so until the complaint was in final form, is illogical, since if the striking of the allegations is necessary to render the complaint demurrable, the deletion of such matter would be improper. *Elliott v. Swartz Industries*, 425.

A motion for continuance is addressed to the discretion of the trial court. *Ibid.*

§ 6. Authority, Conduct and Acts of Court.

The trial court has discretionary power to suggest to counsel that he read to the jury certain letters offered in evidence and to interrogate a witness in regard to a matter not theretofore made clear by the testimony, and such conduct will not be held for error on objection of the adverse party in the absence of abuse of discretion. *Pegram West v. Ins. Co.*, 277

The trial judge is not required to read authority cited by counsel in support of a motion. *Ibid.*

The action of the court in dictating renewal motion to nonsuit at the close of all the evidence cannot be held for prejudicial error on objection of movant. *Ibid.*

§ 7. Argument and Conduct of Counsel.

Counsel have the right to argue the law to the jury as well as the facts. *Brown v. Vestal*, 56.

TRIAL—*Continued.*

§ 19. Province of Court and Jury in Regard to Evidence.

The competency, admissibility and sufficiency of the evidence are for the court; the credibility, probative force and weight of the testimony are for the jury. *Graham v. Gas Co.*, 680.

§ 21. Office and Effect of Motion to Nonsuit.

A motion to nonsuit challenges the legal sufficiency of the evidence to take the case to the jury, admitting for the purpose of the truth of all facts in evidence tending to sustain plaintiffs' claim and every reasonable inference therefrom. *Graham v. Gas Co.*, 680.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

Plaintiff's evidence will be as true and considered in the light most favorable to him on motion to nonsuit. *Higdon v. Jaffa*, 242; *Carson v. Doggett*, 629.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

Where at the close of plaintiff's evidence, nonsuit is entered on one of the causes of action, that cause is no longer pending, and defendant's evidence thereafter introduced cannot be considered in determining the correctness of the nonsuit. *Lamm v. Shingleton*, 10.

Defendant's evidence in conflict with that of plaintiff will not be considered on motion to nonsuit. *Carson v. Doggett*, 629.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

Compulsory nonsuit cannot properly be entered if the facts are in dispute, or if the testimony in relation to the facts is such that different conclusions may reasonably be reached thereon. *Graham v. Gas Co.*, 680.

§ 26. Effect of Nonsuit.

Judgment of nonsuit entered on one cause of action terminates that cause, and defendant's evidence thereafter introduced on remaining cause cannot be considered in determining correctness of the nonsuit. *Lamm v. Shingleton*, 10.

§ 28. Directed Verdict and Peremptory Instructions—Form and Distinctions.

An instruction that if the jury should find the facts to be as all the witnesses had testified and as the record evidence discloses, to answer the issue as directed, is the correct form of a peremptory instruction. *Trust Co. v. Casualty Co.*, 510.

§ 31b. Statement of Evidence and Application of Law Thereto.

It is the duty of the court to explain the law and apply it to the testimony in the case. G.S. 1-180. *Brown v. Vestal*, 56.

An instruction that the jury should be guided by the law as argued by counsel if not inconsistent with the rules of law laid down by the court, but to follow the instructions given by the court if argument of counsel was inconsistent therewith, must be held for reversible error. *Ibid.*

§ 36. Form and Sufficiency of Issues.

Where the issues submitted present to the jury all proper inquiry as to all determinative facts in dispute, and afford the parties opportunity to introduce

TRIAL—*Continued.*

all pertinent evidence and to apply it fairly, they are sufficient, and exceptions thereto will not be sustained. *Cherry v. Andrews*, 261.

§ 38. Tender of Issues.

The refusal to submit an issue tendered will not be held for error when the first part of the issue follows as a matter of law upon the uncontroverted facts and the second part of the issue is expressly covered in the issue submitted. *Williams v. Williams*, 33.

Where the issues submitted are sufficient to embrace all essential questions in controversy and to afford each party opportunity to present its case to the jury, exception to the court's refusal to submit issues tendered cannot be sustained. *Whiteman v. Transportation Co.*, 701.

§ 39. Form and Sufficiency of Verdict.

A verdict will be sustained when, considered in the light of the pleadings, evidence and charge of the court, it is determinative of all material questions presented in the action. *Combs v. Porter*, 585.

§ 55. Trial by Court Under Agreement—Findings.

Where the parties waive a jury trial and agree that the court find the facts, the court's findings have the force and effect of a verdict of the jury upon the issues involved. G.S. 1-184, Constitution of N. C., Art. IV, Sec. 13. *Burnsville v. Boone*, 577.

TRUSTS.

§ 2a. Creation and Validity of Parol Trusts in General.

Neither a grantor nor those claiming under him may engraft a parol trust upon his deed absolute in form. *Walker v. Walker*, 54.

In the absence of fraud, mistake or undue influence, the grantor in a deed conveying property in fee simply may not engraft a parol trust thereon upon allegations that he had purchased the property and conveyed it to the grantee under oral agreement that the grantee would advance the purchase money and would hold the property for the use and benefit of grantor. *Jones v. Brinson*, 63.

§ 3a. Requisites and Validity of Express Trusts.

Letter which does not establish fiduciary relationship or transfer title for such purpose as of that time, is insufficient to establish trust. *Sinclair v. Travis*, 345.

§ 4b. Transactions Creating Resulting Trusts.

Husband may show by clear, strong and convincing proof that purchase money furnished by him for home was not gift to wife, but that it was agreed that she hold title for their joint benefit. *Williams v. Williams*, 33.

Evidence that husband paid premiums of policy on life of wife's father, that proceeds of policy was used for down payment on joint home, and rents therefrom used to pay mortgage, *held* to establish his payment of at least half of purchase price in his action to establish trust under agreement that she should hold title for both. *Ibid.*

In this action to impress a trust on title to realty upon allegations that at the time defendants purchased the property and took title, it was agreed that

TRUSTS—*Continued.*

they hold it for the benefit of plaintiff and defendants, demurrer *held* properly overruled. *Brown v. Vestal*, 56.

§ 5b. Transactions Creating Constructive Trusts.

Plaintiffs' allegations and evidence were to the effect that after defendant's father had conveyed the lands to him defendant requested his father to repurchase same, that the father paid a sum of money for the repurchase and went into possession, that the son said his deed had been lost and that as soon as he could find it he would destroy it and thus revest title in his father, and that subsequent to the father's death the son recorded the deed. *Held:* The parol agreement to revest title in the father comes within the statute of frauds and is voidable at the option of the son, and therefore the action of the son in doing what he had a legal right to do cannot be made the basis for a charge of fraud so as to impress a trust upon his title to the property. *Walker v. Walker*, 54.

§ 9. Appointment of Substitute and Successor Trustees.

Where a trust indenture is to a trustee, its successors and assigns, the indenture contemplates the possible appointment of a substitute trustee by conveyance, and the trustee has the power to convey the property to another for the administration of the trust upon the conditions set forth in the indenture when necessary for the preservation of the trust and the accomplishment of its objective. *Hospital v. Cone*, 292.

§ 20b. Modification of Trust or Sale Under Equity Jurisdiction of Court.

A court of equity has inherent power to authorize to be done whatever is necessary to preserve a trust and to accomplish its objective. *Hospital v. Cone*, 292.

When condemnation of right of way for a Federal scenic highway through lands held in trust for a public memorial park is imminent, a court of equity has authority to empower the trustee to convey the park land to the United States Government upon its agreement to develop and maintain the property under the name designated in the trust and in substantial accord with all the terms and conditions thereof, with minor modifications incidental to the establishment of a scenic highway through the park, with further provision for reverter to the trustee upon failure of such use, such conveyance being necessary under the circumstances for the preservation of the trust and the accomplishment of its objective. *Ibid.*

When subsequent changes in conditions not anticipated by the creator of a trust threaten the destruction of the trust and the loss of the trust estate, a court of equity has power to modify the terms of the trust to the extent necessary to preserve the trust estate and to effectuate the primary purpose of the creator of the trust. *Hospital v. Comrs. of Durham*, 604.

Where, due to changed conditions, increase in population and charity load, and increase in operational costs, the maintenance of a charitable hospital is endangered because of lack of funds for necessary repairs and modernization, a court of equity has the power to modify the terms of the trust indenture for the hospital property and the trust endowment in order that the trustees may convey same to the county under an agreement for the perpetual operation of the hospital under the same name. *Ibid.*

TRUSTS—*Continued.*

§ 20c. Sale by Direction of Cestuis.

Where property is conveyed to trustees for the benefit of an unincorporated association, the conveyance of the property by the trustees to a designated person by the unanimous direction of the members of the association, is effective and cannot subsequently be challenged by the association, even if it later acquires the capacity to sue in its own name, nor by persons joining the association thereafter, since such persons never acquired any rights in the property. *Lodge v. Benevolent Asso*, 522.

§ 28. Termination of Trust Under Terms of Instrument.

Where a will gives specific directions that a trust therein created shall terminate twenty years from the date of testator's death, upon expiration of this twenty year period the *corpus* of the estate passes to the beneficiaries entitled thereto and the offices and duties of the trustees end. *Lide v. Mears*, 111.

VENDOR AND PURCHASER.

§ 7. Payment or Tender of Purchase Price.

Where the vendor disavows the contract, the purchaser is not required to tender the purchase price within the period of the option, since the law does not rquire the doing of a vain thing. *Penny v. Nowell*, 154.

§ 25a. Actions by Purchaser Against Vendor for Damages for Breach of Contract.

In plaintiff's action to cancel contract of record, defendant set up a counterclaim for breach of a provision therein giving defendant the right to purchase or sell specified property for a stipulated price within a period of thirty days after termination of the contract. The defendant testified that within the period of the option she obtained a purchaser able and willing to buy the property at a price in excess of that stipulated in the option, and that plaintiff refused to consider the offer or make deed on the ground that the contract was void. *Held:* The granting of nonsuit on the counterclaim was error. *Penny v. Nowell*, 154.

VENUE.

§ 1b. Actions by or Against Executors or Administrators.

The right of an administratrix in regard to motions for change of venue under G.S. 1-78 may not be invoked by another party to the action. *Herring v. Coach Co.*, 430.

§ 4b. Change of Venue for Convenience of Witnesses.

While in the exercise of its discretionary power to remove a cause for the convenience of witnesses and to promote the ends of justice, the trial judge has no authority to impose upon movant an obligation for which he is not legally liable, the court may incorporate in the order of removal, with movant's consent, provision that movant pay the reasonable costs of transporting the witnesses of the adverse party when the court is of opinion that removal, even though required for the convenience of witnesses, would not promote the ends of justice unless movant should pay such expense. *Nichols v. Goldston*, 581.

WAIVER.

§ 2. Acts Constituting Waiver.

A waiver is simply an intentional relinquishment of a known right. *Land Bank v. Bland*, 26.

WATERS AND WATERCOURSES.

§ 3. Pollution of Natural Streams.

The complaint alleged that defendant corporation discharged industrial wastes into a stream above plaintiff's property and that defendant municipality discharged sewage therein, and that the several, joint and concurrent acts of both defendants rendered the waters of the creek polluted and constituted a continuing trespass and nuisance to the damage of plaintiff's property. *Held:* Demurrer on the ground of misjoinder of parties and causes was properly overruled. *Stowe v. Gastonia*, 157.

A lower proprietor may join in one action separate defendants upon allegations that each washed earth and gravel into the stream which was deposited by the stream on plaintiff's land, resulting in damage. *McKinney v. Deneen*, 540.

Allegations to the effect that defendants pumped water high into the hills and used it to wash tons of earth into the stream, which sediment was deposited on plaintiff's land by the stream, resulting in the damage complained of, alleges a direct invasion of or entry upon plaintiff's land amounting to a taking or appropriation of their property, and not merely the permitting of sediment to run off into the natural course of the stream. *Ibid.*

G.S. 74-31 does not purport to relieve persons engaged in mining from liability for damages directly resulting to the lands of a lower proprietor from the discharge into the waters of a stream waste and sediment incidental to the mining of kaolin and mica, and demurrer is erroneously sustained in an action by such lower proprietor to recover damages to his land resulting from the deposit from such sediment thereon by the stream. *Ibid.*

§ 4. Diversion of Surface Waters.

The lower land must receive the natural flow of surface water from adjoining higher land, but the owner or occupant of the higher land is liable for damages proximately resulting to the lower land from the diversion of the surface water or interference with its natural flow by artificial obstruction. *Phillips v. Chesson*, 566.

Where the diversion of surface water by a private owner results in continuing recurrent damages to the adjacent lower land of a private owner, and the cause of the damage is subject to removal by the voluntary action of the owner of the upper land or to abatment by court order, permanent damages may not be assessed except by consent of the parties. *Ibid.*

WILLS.

§ 4. Contracts to Devise.

Asserted contract to devise notes to maker's children *held* not supported by consideration and is unenforceable *Sinclair v. Travis*, 345.

§ 6. Signature of Testator.

It is not necessary that testator sign his will in the presence of the attesting witnesses, but if he does not do so he must acknowledge his signature either by acts or conduct. *In re Will of Franks*, 252.

WILLS—*Continued.*

§ 7. Attestation and Subscribing Witnesses.

It is not required that subscribing witnesses sign same in the presence of each other but they must sign simultaneously with or subsequent to the signing of the instrument by testator. *In re Will of Franks*, 252.

§ 16. Effect of Probate in Common Form.

The probate of a will in common form is conclusive and may be vacated or annulled only by direct proceeding in the manner provided by statute. *In re Will of Winborne*, 463.

§ 17. Nature and Prerequisites of Caveat Proceedings.

A check to be held in lieu of bond is insufficient as bond, G.S. 31-33, and proper bond being necessary to give clerk jurisdiction and to institute proceedings, court may not allow caveator to replace check with cash bond after seven year period for caveat had expired. *In re Will of Winborne*, 463.

The statute permitting caveats is in derogation of the common law and must be strictly construed. *Ibid.*

§ 21c. Fraud, Duress and Undue Influence.

Undue influence need not amount to fraud, but there must be a substitution of the will of testator by that of the influencing party. *In re Will of Franks*, 252.

Influence gained by kindness is not undue influence. *Ibid.*

§ 22. Burden of Proof in Caveat Proceedings.

The burden is upon caveators to prove mental incapacity by the greater weight of the evidence, since the presumption is against them. *In re Will of York*, 70; *In re Will of Franks*, 252.

§ 23a. Competency of Evidence in Caveat Proceedings in General.

The probate of the will in common form is incompetent evidence in a caveat proceeding, even for the purpose of corroborating witnesses for propounder. *In re Will of Etheridge*, 502.

§ 23b. Testimony on Issue of Mental Capacity.

It is reversible error to permit witnesses to testify that in their opinion testator had sufficient mental capacity to "make a will" on the date in question, but testimony of a nonexpert witness should be limited to his opinion as to whether testator had sufficient mental capacity to know what he was doing, what property he had and to whom he wished to give it, it being the province of the jury to decide upon the evidence whether testator had sufficient mental capacity to make the will. *In re Will of York*, 70.

Evidence that some three years prior to the execution of the will attached, testator had executed a paper writing making substantially the same disposition of his property, is competent on the issue of mental capacity. *In re Will of Franks*, 252.

Testimony that testator had no reason for unequal distribution of property among children is properly excluded on issue of mental capacity when testator explains reasons for such distribution in the will. *Ibid.*

WILLS—*Continued.*

§ 23c. Testimony on Issue of Undue Influence.

Testimony that some three years prior to the execution of the will attached, testator had executed an instrument making substantially the same disposition of his property, is competent on the issue of undue influence. *In re Will of Franks*, 252.

The exception to the exclusion of testimony of a witness that the general public thought the testator was influenced by propounder to make the will is without merit when the witness also testifies to the effect that he did not know it to be a fact that testator was so influenced. *Ibid.*

Where caveators introduce evidence to the effect that propounder, prior to the execution of the will, had been given certain property by his father, the testator, it is competent for propounder to introduce a written statement executed by his father, duly identified, to the effect that propounder had paid full purchase price for the property in question. *Ibid.*

Fact that testator makes unequal division of property among his children is not a circumstance to be considered on undue influence when testator in the instrument explains his reasons for such distribution. *Ibid.*

§ 24. Sufficiency of Evidence and Nonsuit in Caveat Proceedings.

Testimony of one subscribing witness to the effect that he signed the instrument at the request of testator simultaneously with the testator, and testimony of the other that when he signed same it had already been signed by testator, together with testimony that testator stated to the witnesses that the instrument was his will and requested them to sign same, *is held* sufficient to show formal execution of the will, G.S. 31-3, and to support the charge of the court thereon. *In re Will of Franks*, 252.

§ 25. Instructions in Caveat Proceedings.

The burden of proof on the issue of mental capacity is on caveators, and therefore an instruction to the effect that if the jury should find from the greater weight of the evidence that the will had been executed in conformity with law to answer the issue of *devisavit vel non* in the affirmative "unless the evidence satisfies you that at the time" testator did not have testamentary capacity, is not error. *In re Will of Franks*, 252.

Instructions to the jury to the effect that undue influence need not necessarily involve moral turpitude or even bad or improper motive, but that it is such influence by fraud or force or both as to amount to a substitution of the will of the influencing party for that of testator, *is held* without error. *Ibid.*

Instructions on the issue of undue influence to the effect (1) that whether it was exerted by the beneficiary or by any other person in his behalf is a deduction to be made by the jury from all the evidence, (2) that mere persuasion would not render a will void in the absence of imposition or fraud, and (3) influence gained by kindness and affection is not undue influence even though it induced testator to make an unequal and unjust disposition of his property, if such disposition was voluntarily made, *held* without error. *Ibid.*

§ 31. General Rules of Construction.

A will must be construed as it is written. *Lide v. Mears*, 111.

Where a will, in one item, provides for the distribution of income from property to be held in trust, and by subsequent item directs that upon the termination of the trust the property should be equally divided among the

WILLS—*Continued.*

"heirs" of testator's children, *held*, a codicil, amending the first item by making disposition of a parcel of the property in fee, controls, and precludes the division of such parcel among the heirs of testator's children upon the termination of the trust. *Lide v. Mears*, 111.

A will must be construed to ascertain and effectuate the intent of testator unless contrary to some rule of law or at variance with public policy, and to this end it is permissible for the courts to transpose words, phrases or clauses. *House v. House*, 218.

The intent of testator is his will, and such intent will be gathered from the four corners of the instrument, and to this end the court may transfer words and phrases to prevent the clear intention of testator from being defeated by inept use of language. *Sutton v. Quinnerly*, 670.

A will should be construed from its four corners, giving effect, if possible, to every clause, phrase or word therein, in order to effectuate the intent of the testator as gathered from the entire instrument. *Bank v. Brawley*, 687.

§ 32. Rule Against Partial Intestacy.

The rule against partial intestacy is merely a rule of construction to ascertain testator's intent, and it cannot be employed to throw into the residuary clause a remainder after a life estate when it is apparent from the construction of the entire instrument that testator intended to dispose of such remainder in the same item which created the life estate. *Sutton v. Quinnerly*, 670.

§ 33b. Application of Rule in Shelley's Case.

A devise of one-half interest in realty for life of the beneficiary and at his death "in fee to his bodily heirs" gives the beneficiary the fee simple title to an undivided one-half interest under the rule in *Shelley's case*. *Lide v. Mears*, 111.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

The courts favor the early vesting of estates. *House v. House*, 218.

A devise of realty in fee with the proviso that if the beneficiary should die without bodily heirs the property should go to another, confers a defeasible fee which is converted into a fee simple absolute upon the death of the beneficiary leaving issue. *Lide v. Mears*, 111.

Testator devised the land in question to his two granddaughters in fee, defeasible as to each upon her dying without issue living at the time of her death, in which case her share was to go to the survivor. *Held:* The defeasance was contingent upon the happening of two events (1) the death of one beneficiary without issue and (2) the survivorship of the other, and upon the death of one of the grandchildren leaving surviving a child, her surviving the other grandchild takes a fee simple absolute and indefeasible as to the other share, since the second contingency was rendered impossible of happening. *Ibid.*

The will in suit set up a trust with provision that at the expiration of twenty years the trust should terminate and the *corpus* be distributed to the heirs of testator's children. *Held:* Upon the death of testator the remainder vested in the children of the son and daughter of testator with the right of enjoyment postponed until the expiration of the twenty years, and their rights are not dependent upon whether or not they survive the twenty year period. *Ibid.*

WILLS—*Continued.*

Testator devised a life estate to his wife with provision that at her death his lands should be divided among his living children, with particular description as to the share each should take, with further provision that one daughter (who had living children at the time the will was executed) should take a life estate in her share with remainder to her children, and that his other named daughters and three named sons should have their share in fee simple forever "And if either one of my daughters shall die without issue, their share of the lands shall be equally divided among" the three named sons. *Held:* The words "shall die without issue" refer to the death of the devises of the fee and not to the death of the life tenant, and the daughters took a defeasible fee so that upon the death of one of them without issue her surviving, her share became vested in the three named sons. *House v. House*, 218.

Where the life tenant renounces her life estate, the vesting of the remainder is accelerated. *Neill v. Bach*, 391.

§ 33f. Devises With Power of Disposition.

The will devised a life estate to a beneficiary with power to sell all or any part of the lands or appurtenances, provided the proceeds would add to her common comforts and necessities of life, but making her the sole judge of the time and amount of such sales, with further provision that if any of the lands should remain unsold at the time of the beneficiary's death the "residue" should go to testator's other named nieces and nephews in fee. *Held:* The first taker has the right to sell any or all of the lands as well as timber therefrom, and is entitled exclusively to the proceeds of sale, the sole interest of the remaindermen being in the lands which may remain unsold at the time of the first taker's death. *Langston v. Barfield*, 594.

§ 33g. Life Estates and Remainders.

Testator set up a trust with provision that a specified beneficiary should be entitled to the use of certain property so long as she paid taxes and kept same in repair, but with discretionary power in the trustees to sell the specified property at any time for reinvestment. By another item it was directed the trust should terminate at the end of twenty years from the date of testator's death and the *corpus* be divided as specified. *Held:* The beneficiary did not take a life estate but only a conditional right of occupancy pending sale or termination of the trust, and upon the termination of the trust all her interest in the property ceased. *Lide v. Mears*, 111.

Where a devise is for life with remainder to the life tenant's children, but if she "does not marry" then to her surviving brothers and sisters, *held* the marriage of the life tenant does not defeat the limitation over. *Sutton v. Quinnerly*, 670.

§ 33k. Renunciation of Life Estate and Acceleration of Remainder.

Renunciation of life estate accelerates the vesting of the remainder, but when remainder is to a class, it does not accelerate the time the roll must be called to determine the members of the class. *Neill v. Bach*, 391.

§ 34b. Designation of Devisees and Legatees and Their Respective Shares —Devises to a Class.

Where a will directs that at the termination of the trust therein set up, the property should be "equally divided between the heirs of my children . . . *per stirpes*," the beneficiaries take by right of representation through their respective parents and not as individuals. *Lide v. Mears*, 111.

WILLS—*Continued.*

Where remainder is to the children of the life tenant, the renunciation of the life tenant will accelerate the vesting of the remainder, but not the date at which the roll is to be called to ascertain the members of the class, and children born before the death of the life tenant must be let in, but the other children will not be *held* liable for rents and profits in interim. *Neill v. Bach*, 391.

§ 34e. Designation of Amount or Share of Legatees and Devisees.

Specific legatees, while excluded from distribution under residuary clause, held not excluded from distributive share of residue of trust estate. *Bank v. Brawley*, 687.

§ 38. Residuary Clauses.

The rule against partial intestacy is not one of public policy, but is to be employed solely for the purpose of ascertaining the intent of testator, and therefore it cannot operate to throw into a residuary clause (expressly limited to property not disposed of in prior devises) the remainder after a life estate when it is apparent from the construction of the entire instrument that testator intended to dispose of such remainder in the same item which created the life estate. *Sutton v. Quinnerly*, 670.

§ 42½. Ademption of Specific Legacies.

The principle of ademption of specific legacies obtains in this State as a rule of law, and applies where the subject of a specific legacy has been withdrawn, disposed of, or has ceased to exist in the lifetime of testator. *Green v. Green*, 707.

The will bequeathed specified mortgage notes to named beneficiaries. A number of years prior to his death testator foreclosed the mortgages and purchased the land at the sale. *Held:* The legacies of the mortgage notes adeemed, and the beneficiaries have no interest in the land. *Ibid.*

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G.S.

1-52(9). Evidence *held* correctly submitted to jury on question of whether cause was instituted within three years from time cause for reformation of deed should have been discovered in exercise of due diligence. *Lee v. Rhodes*, 602.

1-57. Assignee of nonnegotiable instrument takes same subject to all defenses which debtor has against assignor at time of assignment. *Iselin & Co. v. Saunders*, 642.

1-78. Statute may be invoked only by personal representative, and not another party to action. *Herring v. Coach Co.*, 430.

1-83(2). While trial court may not impose obligation on movant for which he is not legally liable, court may require movant to pay expenses of transporting witnesses when necessary to promote ends of justice. *Nichols v. Goldston*, 581.

1-97(1); 1-220. Where service of bus company is had by service on saleswoman selling tickets as employee of lessee of bus station, her neglect to notify defendant will not be imputed to it so as to preclude court from exercising discretionary power to set aside judgment upon showing of meritorious defense. *Townsend v. Coach Co.*, 81.

1-127(3). When pendency of prior action does not appear from face of complaint, objection must be made by answer and not demurrer. *Reece v. Reece*, 321.

1-131. Plaintiff may apply for leave to amend after sustaining of demurrer *ore tenus* by Supreme Court. *Perkins v. Langdon*, 386.

1-151. Allegations will be taken as true upon demurrer. *McCampbell v. Building & Loan Asso.*, 647.

1-153; 1-129. Failure to particularize acts of negligence relied on constitutes defective statement of good course of action, waived by answer and cured by amendment, statement of defective cause of action is demurrable at any time before final judgment. *Davis v. Rhodes*, 71.

1-163. Allowance of amendment after verdict in substantial disagreement with evidence must be held for error. *Casstevens v. Casstevens*, 572.

1-180. Instruction that jury should take law from counsel if not inconsistent with rules of law given by court, *held* reversible error. *Brown v. Vestal*, 56.

Ordering sheriff to arrest defendant's witness in presence of jury *held* prejudicial error. *S. v. McNeill*, 666.

Question asked witness by court, even though amounting to expression of opinion on credibility of witness *held* not sufficiently prejudicial to justify new trial. *S. v. Perry*, 467.

1-184. Court's findings have force and effect of verdict. *Burnsville v. Boone*, 577.

1-189. Court may order compulsory reference when examination of long account is involved. *Parker v. Helms*, 334.

Court has discretionary power to refuse compulsory reference even in cases within the statute. *Veazy v. Durham*, 354.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

Findings and conclusions of referee are not competent in evidence in trial of issue raised by exceptions to report. *Cherry v. Andrews*, 261.

1-208. Definition of final and interlocutory judgments. *Veazy v. Durham*, 357.

1-234; 1-306. Lien of judgment expires at end of ten years from date of rendition and not date of docketing. *Land Bank v. Bland*, 26.

1-240. When plaintiff seeks no relief from persons joined as codefendants for purpose of contribution, judgment for original defendants does not preclude plaintiff from suing additional defendants. *Powell v. Ingram*, 427.

1-240; 1-271. Adjudication that plaintiff had failed to state cause of action against one defendant does not preclude other defendant from asserting cross-action against such first defendant for contribution. *Canestrino v. Powell*, 190.

1-253. There must be actual controversy in order for court to acquire jurisdiction under Declaratory Judgment Act, and adverse party cannot confer jurisdiction by consent. *Lide v. Mears*, 111.

1-254. Action to modify judgment may not be maintained under Declaratory Judgment Act. *Howland v. Stitzer*, 529.

1-271; 1-277; 1-279; 1-280. Right of appeal exists only by virtue of statute. *Veazy v. Durham*, 357.

1-277. Interlocutory order which does not determine substantial right is not appealable. *Veazy v. Durham*, 354. Discretionary refusal of compulsory reference is not applicable. *Ibid. Veazy v. Durham*, 357.

1-282. Service of statement of case on appeal may be made by a proper officer by leaving a copy in the office of the solicitor. *S. v. Daniels*, 17.

1-294. Appeal from nonappealable interlocutory order does not deprive superior court of jurisdiction to proceed in the case. *Veazy v. Durham*, 357.

1-539. Ancient writ of nuisance has been superseded under code by civil action for damages or for removal of nuisance, or both. *Barrier v. Troutman*, 47.

4-1. Common law definition of forgery obtains in this State, the statute, G.S. 14-119, not attempting to define it. *Trust Co. v. Casualty Co.*, 510. Writ of error *coram nobis* obtains in this State. *S. v. Daniels*, 17. No common law action by children against third party for disrupting family circle. *Henson v. Thomas*, 173.

6-1. Provision in order for removal that movant should pay "costs" of transporting witnesses *held* to mean "expenses" not constituting part of costs of action. *Nichols v. Goldston*, 581.

7-58; 7-65. Special judge has concurrent jurisdiction with judge of district provided proceeding can be heard and determined during term of court the special judge is commissioned to hold. *In re Cranford*, 91.

7-149(12). Courts may allow amendment to warrant provided nature of offense charged is not changed. *Carson v. Doggett*, 629.

7-407; 7-435; 7-149(12). In assault prosecution, amendment by addition of words "inflicting serious injury," does not change offense, and

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

may be allowed in Superior Court on appeal from county court. *S. v. Carpenter*, 229.

8-4. Court will take judicial notice of laws of sister state. *Caldwell v. Abernethy*, 692.

8-51. Party interested in event may testify as to transactions with decedent upon question of mental capacity. *Goins v. McLoud*, 655.

14-17. Does not change common law definition of murder but merely divides murder into two degrees. *S. v. Streeton*, 301. Murder committed in commission or attempted commission of kidnapping is murder in first degree. *Ibid.* Murder committed in commission or attempted commission of robbery is murder in first degree. *S. v. Chavis*, 307. Where all evidence shows murder committed in perpetration of robbery, court need not submit guilt of second degree murder. *S. v. Brown*, 152. Court *held* to have sufficiently called to jury's attention its right to recommend life imprisonment. *S. v. Speller*, 549.

14-87. Does not divide robbery into separate offenses but merely provides more severe punishment if robbery is committed by use or threatened use of firearms. *S. v. Chase*, 589.

14-134. Proof that defendant entered land under *bona fide* claim of right is defense to prosecution under this section. *S. v. Baker*, 136.

14-160. Proof of destruction of fence will not support conviction under this section. *S. v. Baker*, 136.

14-290; 14-291.1. Testimony that on other occasions like tickets had been found in defendant's home *held* competent. *S. v. Bryant*, 106.

14-325. Where defendant denies paternity of child, submission of separate issue thereon is not error. *S. v. Stone*, 324.

15-19; 15-20. Warrant must sufficiently identify accused. *Carson v. Doggett*, 629.

15-169; 15-173. Nonsuit on offense charged and submission of question of guilt of less degree of crime *held* not nonsuit of indictment, and motion in arrest of judgment will not lie. *S. v. Matthews*, 617.

15-170. Error in submitting question of guilt of less degree of crime cannot be prejudicial to defendant. *S. v. Chase*, 589.

15-173. Circumstantial evidence as to identity of defendant as perpetrator of crime *held* insufficient, and nonsuit granted in Supreme Court. *S. v. Cranford*, 211. Decision of Supreme Court in sustaining exception to refusal to nonsuit has force and effect of verdict of not guilty. *S. v. Baker*, 136.

18-50; 18-11. Warrant charging possession of "non-tax-paid" whiskey, under the facts, *held* not to restrict offense charged to violation of G.S. 18-50, and therefore possession of more than gallon raised presumption of possession for purpose of sale. *S. v. Merritt*, 59.

20-141. Driver must reduce speed when special hazards exist. *Bobbitt v. Haynes*, 373.

20-141(b); 20-141(5)(d). Highway Commission may make special speed restrictions when appropriate signs are erected. *Whiteman v. Transportation Co.*, 701. Speed in excess of limits is unlawful and not merely *prima facie* evidence. *Ibid.*

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

20-150(c). Evidence *held* not to show contributory negligence as matter of law in attempting to pass truck before reaching intersection. *Howard v. Bingham*, 420.

20-154. Making left turn without signaling is not negligence when under circumstances driver could not reasonably apprehend that movement would affect other vehicles. *Cooley v. Baker*, 533.

20-156(a). Does not apply to motorist entering highway from public street. *Bobbitt v. Haynes*, 373.

20-158. Failure to stop before entering intersection with dominant highway is not negligence *per se*, but only evidence of negligence. *Bobbitt v. Haynes*, 374; *Bailey v. Michael*, 404.

20-188. Highway patrolman may arrest person upon advice that such person had made armed threats of robbery, and may use airplane in searching for such criminal. *Galloway v. Department of Motor vehicles*, 447.

22-1. Agreement of mortgagee to pay for lumber used in construction of house on premises is original promise not coming within statute. *Pegram-West v. Ins. Co.*, 277.

22-2. May not be taken advantage of by demurrer. *McCampbell v. Building & Loan Asso.*, 647.

25-192; 25-197. Check does not operate as assignment of funds until accepted or cashed. *In re Will of Winborne*, 463.

28-1; 28-6. Jurisdiction of clerk as probate judge is invoked by petition showing requisite jurisdictional facts filed by person entitled to qualify; failure to give bond does not render letters void. *In re Pitchi*, 485.

28-173. That action for wrongful death is instituted within one year of the death need not be alleged in complaint. *Colyar v. Motor Lines*, 318. Amendment curing defective statement of good cause of action by particularizing acts of negligence relied on does not constitute new cause, and action is not barred if original complaint was filed in time. *Davis v. Rhodes*, 71.

31-3. Testimony *held* to show that subscribing witnesses signed in that capacity at request of testator after or simultaneously with signing by testator. *In re Will of Franks*, 252.

31-33. Check deposited with clerk in lieu of bond is insufficient to meet requirements of statute and caveat is invalid, and filing of proper bond more than seven years is too late. *In re Will of Winborne*, 463.

40-3. Mere threat to take right of way and isolated act in going on land in making preliminary survey is not a "taking." *Penn v. Coastal Co.*, 481.

40-12. Owner may not maintain action for assessment of damages until there has been a "taking." (Ch. 1024, Session Laws 1949.) *Penn v. Coastal Co.*, 481.

41-1. Deed to specified person "and to her heirs" conveys fee simple. *Pittman v. Stanley*, 327.

41-6 Limitation to heirs of living person will be construed to be to children of such person unless contrary intent appears. *Ellis v. Barnes*, 543.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

41-11. Acceleration of remainder to a class does not change date of calling of roll to determine members of the class. *Neill v. Bach*, 391.

42, Art. 3. Defendant's claim of improvements is outside scope of summary ejectment and is not justiciable therein. *Ford v. Moulding Co.*, 105.

42-1. Rent fixed at percentage of profits does not constitute lessor partner in the business. *Perkins v. Langdon*, 386.

44-1. Lien of purchase money deed of trust is superior to materialman's lien against purchaser. *Supply Co. v. Rivenbark*, 213.

45-4. Where there are two executors of deceased mortgagee, power of sale must be exercised by them jointly. *Combs v. Porter*, 585.

45-24. Vendor may recover deficiency judgment after repossession and sale of chattel. *Mitchell v. Battle*, 68.

45-28; 1-310. Delay of sheriff in making deed and formal return does not affect validity of sale when right to deed vests in 90 days after issuance of execution. *Land Bank v. Bland*, 26.

47-20; 47-23. Evidence *held* sufficient to support finding that chattel mortgage on truck of nonresident was registered in county where property was situated. *Montague Brothers v. Shepherd*, 551. Evidence that conditional sales contract on truck of nonresident was registered in county of vendee's residence *held* sufficient. *Sheffield v. Walker*, 556.

48-3; 48-4; 48-5; 49-12. Upon marriage of mother and reputed father, proceedings for adoption upon consent of mother should be revoked. *In re Doe*, 1.

50-13. Jurisdiction to award custody of children rests exclusively in court in which divorce action is pending, and may not be awarded in later action by one of parties for subsistence without divorce. *Reece v. Reece*, 321.

50-13; 17-39; 110-21. G.S. 50-13 authorizes special proceeding by mother of illegitimate child to obtain its custody from her aunt. *In re Cranford*, 91.

50-15. Finding that plaintiff had established *prima facie* right to alimony *pendente lite* is insufficient when defendant has offered evidence *contra*, it being necessary that court find facts in exercise of own sound judgment. *Cameron v. Cameron*, 123.

50-16. Right to alimony without divorce must be asserted by independent action, and prior action by husband for divorce does not abate wife's subsequent action for alimony without divorce. *Reece v. Reece*, 321.

52-10. Wife may maintain action against husband for negligent injury. *King v. Gates*, 537.

52-12. Does not apply to action by husband to establish resulting trust. *Williams v. Williams*, 33.

55-115; 55-116. *Mandamus* will lie to compel declaration of dividends only if it is shown that at time relief is demanded that dividend would be from profits and would not impair capital stock or working capital. *Steele v. Cotton Mills*, 636.

55-136. Employees have lien against receiver for ⅙ of vacation pay, but none for severance. *In re Publishing Co.*, 395.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

58-177. Facts alleged *held* sufficient to constitute waiver of policy requirement as to time for furnishing proof of loss. *Meekins v. Ins. Co.*, 452.

74-31. Does not purport to relieve persons engaged in mining from liability for damages directly resulting from deposit of silt on lands of lower proprietor. *McKinney v. Deneen*, 540.

84-14. Counsel have right to argue law as well as facts. *Brown v. Vestal*, 56.

95-79, *et seq.* Provisions for closed shop are void, but statute does not preclude provisions relating to working conditions, hours, rates of pay, overtime, etc.

96-8(f)(1). Purchaser of business is liable for tax when more than eight employees have been employed therein for requisite period before and after purchase. *Employment Security Com. v. Whitehurst*, 497.

96-14(d). After strike, notice of suspension of operations and that employees might seek other employment, *held* not discharge. *Employment Security Com. v. Jarrell*, 381.

97-10. When neither employer nor insurance carrier brings action against third person tort-feasor within six months, injured employee may bring such action in own name. *Jones v. Elevator Co.*, 285.

97-53. Only occupational diseases specifically designated are compensable; dermatitis is not compensable. *Henry v. Leather Co.*, 477.

97-87. Industrial Commission is sole judge of weight and credibility of evidence before it. *Henry v. Leather Co.*, 477.

105-333. Act permitting governing board of town to value property for taxation independently of statute is unconstitutional. *Bowie v. West Jefferson*, 408.

105-391(e). Right to serve unknown owners by publication must not be used as subterfuge when names can be discovered by due diligence. *Wilmington v. Merrick*, 297.

105-414. In action to foreclose tax lien, persons having interest in equity of redemption must be made parties by name. *Wilmington v. Merrick*, 297.

113-170. Indictment charging defendants with unlawfully taking fish with use of dynamite is insufficient to charge offense. *S. v. Miller*, 319.

115-85. County board of education may select 10 acre tract for school site contiguous to existing school. *Board of Education v. Lewis*, 661.

128-6; 128-7. Sentence imposed by judge *de facto*, if not *de jure*, cannot be collaterally attacked in *habeas corpus*. *In re Wingler*, 560.

131-126.18; 153-77. Surplus building fund may be used to build nurses' home on hospital property. *Worley v. Johnston County*, 592.

131-126.23. Bonds may be issued for public hospital upon approval of voters. *Hospital v. Comrs. of Durham*, 604. And may take over charitable hospital as trustee. *Ibid.*

136-67. Evidence *held* insufficient to show that reconstruction of road was authorized or directed by Department of Public Welfare. *Raynor v. Ottoway*, 99.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

148-11; 148-20. Prison official may be liable for criminal assault in punishing prisoner if regulation under which punishment is given exceeds statutory authority or if manner and extent of punishment is unreasonable. *S. v. Carpenter*, 229.

153-9(10), (12). Where there is a vacancy in office of tax manager, county commissioners may appoint acting tax manager. *Roberts v. McDevitt*, 458.

156-2, *et seq.* Evidence tending to show only granting of easement to drain into existing canal *held* insufficient to show establishment of drainage corporation. *In re Canal*, 131.

158-1; 160-1. City may not use tax revenues to pay ordinary expenses of chamber of commerce. *Horner v. Chamber of Commerce*, 440.

160-25. Chief of police of incorporated town must be resident. *Barlow v. Benfield*, 663.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 15. Warrant must sufficiently identify accused. *Carson v. Doggett*, 629.

I, sec. 17. Notice and opportunity to be heard are essential to due process of law. *Townsend v. Coach Co.*, 81.

I, sec. 17; I, sec. 35. G.S. 74-31 could not authorize mica mining company to deposit silt on another's land to its damage without compensation. *McKinney v. Deneen*, 540.

I, sec. 35. Court may disregard attempted appeal from nonappealable interlocutory order and proceed with trial to avoid delay. *Veazy v. Durham*, 357.

II, sec. 29. Does not render invalid private act establishing court passed prior to effective date of amendment. *In re Wingler*, 560.

IV, secs. 2, 12. Court established by private act passed prior to effective date of Art. II, sec. 29, is valid. *In re Wingler*, 560.

IV, sec. 8. Supreme Court may entertain application for permission to file writ of error *coram nobis*. *S. v. Daniels*, 17.

IV, sec. 13. Court's findings have force and effect of verdict. *Burnsville v. Boone*, 577.

V, sec. 3. Bonds may be issued for public hospital upon approval of voters. *Hospital v. Comrs. of Durham*, 604.

V, sec. 6. Expenditures by county for maintenance of rural police force is for continuing expense in discharge of governmental function, and therefore is general county purpose within meaning of constitutional limitation of tax rate. *R. R. v. Mecklenburg County*, 148.

VII, sec. 1. County is governmental unit of State existing for purpose of maintaining law and order and to assure large measure of local self-government. *R. R. v. Mecklenburg County*, 148.

X, sec. 2. Homestead is solely for benefit of debtor, and therefore creditors cannot complain of debtor's waiver of right in favor of other creditors. *Land Bank v. Bland*, 26.

X, sec. 6. Power of married woman to effect conveyance by estoppel *in pais* is delimited. *Bank v. Sherrill*, 731.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

IV, sec. 1. Judgment of another state may be collaterally attacked only for lack of jurisdiction, fraud in procurement, or as against public policy. *Howland v. Stitzer*, 528.

IVth Amendment to Federal Constitution. Warrant must sufficiently identify accused. *Carson v. Doggett*, 629.

Vth and XIVth Amendments to Federal Constitution. Notice and opportunity to be heard are essential to due process of law. *Townsend v. Coach Co.*, 81.

XIVth Amendment to Federal Constitution. G.S. 74-31 could not authorize mica mining company to deposit silt on another's land to its damage without compensation. *McKinney v. Deneen*, 540.